APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1971

FILED
APR 22 1972
MICHAEL RODAK, JR., CLERK

No. 71-366

TIDEWATER OIL COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1971
PETITION FOR CERTIORARI DENIED NOVEMBER 8, 1971
MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING
AND PETITION FOR REHEARING FILED JANUARY 31, 1972
MOTION FOR LEAVE TO FILE OUT-OF-TIME
PETITION FOR REHEARING AND AMENDED PETITION FOR REHEARING
FOR CERTIORARI GRANTED, AND PETITION FOR CERTIORARI
DENIED MARCH 20, 1972

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Appendix C to Petition for Permission to Appeal incorporated by reference to Appendix C to the Petition herein for Certiorari	
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Appendix F to the Petition for Permission to Appeal incorporated by reference to Appendix E to the Petition herein for Certiorari	

Appendix 1

United States Court of Appeals
For the Ninth Circuit

MISC. NO. 5791

[Names and Addresses of Attorneys Omitted]

TIDEWATER OIL CO.,

Petitioner-Appellant

vs.

U.S.A., and PHILLIPS PETROLEUM CO.,

Respondents-Appellees

District and No. Below:	66-1154 cent dist
Judge Below:	W. J. Ferguson
Date of Judgement:	n/a
Filed in DC:	6/24/71
Notice of Appeal Filed:	n/a

NATURE OF PROCEEDING: civil

Petition for permission to appeal under 28 U.S.C. Section § 1292 (b) interlocutory appeal

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Date 1971	FILINGS-PROCEEDINGS
July 1	Rcvd June 30 orig and three copies of a petition for permission to appeal under 28 U.S.C. § 1292(b). To panel of July 6, 1971. C, H (7/12/71)
July 1	Rcvd $25.00 docket fee—to Miss Murphy
July 9	Received memorandum from Browning to send all material to panel of 7/12/71 C, H
July 12	Recvd. orig & three of answer of the US to petition (C & H)
July 14	Rcvd orig and three of reply memorandum of petitioner in support of petition for permission to appeal under 28 USC § 1292(b). To C, H. July 12, 1971.
Jul 28	Filed order (C & H) denying pet for leave to appeal under § 1292 (b)
Sept. 21	Issued certified copy of record to Clk Sc for certiorari.
Nov. 18	Filed cert copy of SC order (11/9/71) denying pet for cert
Date 1972	
March 27	Filed certified copy of SC order (3/20/72) granting motion for leave to file petition for rehearing; further ordered that order of Nov. 9th, 1971, be vacated. (C & H) ht
27	Filed certified copy of SC order (3/20) granting petition for writ of certiorari (C & H) ht

Appendix 2

United States Court of Appeals
For the Ninth Circuit

Filed Jul 28 1971

TIDEWATER OIL COMPANY, *Defendant and Petitioner,* vs. UNITED STATES OF AMERICA *Plaintiff and Respondent.* and PHILLIPS PETROLEUM COMPANY, *Defendant and Respondents.*	Misc. 5791

Before: CHAMBERS and HAMLEY, Circuit Judges

The petition for leave to appeal under § 1292(b) is denied. *United States v. Ford Machinery Corporation*, 9 Cir., 321 F.2d 534.

Appendix 3

In the
United States Court of Appeals
For the Ninth Circuit

Misc. No. 5791

TIDEWATER OIL COMPANY,

Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

and

PHILLIPS PETROLEUM COMPANY,

Defendant-Respondent.

PETITION FOR PERMISSION TO APPEAL
UNDER 28 U.S.C. § 1292(b)

Pursuant to 28 U.S.C. § 1292(b)[1] Tidewater Oil Company (hereafter "Tidewater") petitions the Court for permission to

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All emphasis in quotations has been added unless otherwise noted.

1. Section 1292(b):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

appeal from an order entered June 24, 1971 in the United States District Court for the Central District of California in the case of *United States of America v. Phillips Petroleum Company and Tidewater Oil Company,* Civil No. 66-1154-WJF, denying Tidewater's motion to dismiss the case as against it (Appendix A).[2]

The question involved is so important and the answer to it so determinative of the future course of the case that, in denying the motion, the District Court on its own initiative stated that it would certify the matter for an interlocutory appeal and would defer trial of the case until the question was authoritatively decided (App. F).

The District Court's formal order certified under 28 U.S.C. § 1292(b) that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation" (App. A).

I.

STATEMENT OF THE FACTS

March 29, 1966, Tidewater entered into a contract with Phillips Petroleum Company (hereafter called Phillips) to sell to Phillips for $325,000,000 the manufacturing, marketing and transportation assets of Tidewater's Western Marketing and Manufacturing division, but not its production properties, the transaction to be consummated on June 30, 1966. At the request of the Antitrust Division of the United States Department of

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2. The following appendices are attached to this petition:
   - A: Order denying motion to dismiss;
   - B: The complaint;
   - C: Findings of Fact and Conclusion of Law in re Motion for Preliminary Injunction and Order;
   - D: Tidewater's notice of motion to dismiss;
   - E: Affidavit of R. D. Copley, Jr.;
   - F: Excerpts from the transcript on the hearing of the motion to dismiss.

Justice on June 28, 1966, Tidewater and Phillips voluntarily postponed the consummation to July 14, 1966 at 10 A.M. E.D.T.[3] The Division did not reach a decision to oppose the transaction until July 13, 1966, the day before the scheduled closing. On that day it filed a complaint in the court below against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Section 7 of the Clayton Act (App. B).[4]

Section 7 (15 U.S.C. § 18) provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The relevant portion of Section 7 is that which refers to acquisition of assets, as no stock or share capital passed in either direction.

Concurrently with filing the complaint, plaintiff applied to the District Court for a temporary restraining order against the consummation of the transaction pending hearing on a motion for preliminary injunction. What then occurred is related in the findings (App. C) thus:

> "6. After filing its complaint herein on July 13, 1966, plaintiff, in the afternoon of that day, applied to the Honorable Charles H. Carr, District Judge, for a temporary restraining order to restrain the consummation of the transaction. Judge Carr, without ordering any restraint upon defendants, directed the plaintiff to apply to the District Judge to whom the suit had been regularly assigned upon

3. 7 A.M., P.D.T.

4. The foregoing facts appear in findings 1 to 5 of findings below, App. C.

its filing, and plaintiff did so on July 14, 1966.[5] Although the application did not come on for hearing before this Court until after the hour scheduled for closing of the transaction on that day, defendants, *in deference to the Court,* delayed the closing of the transaction pending the Court's judicial determination. In the afternoon of July 14, 1966, this Court denied the requested restraining order, *thus permitting the transaction to be closed.* * * Thereafter on July 14, 1966, Tidewater and Phillips closed and consummated the transaction provided for by the agreement of March 29, 1966. Tidewater thereby sold and transferred title and delivered possession to Phillips of all the properties and assets which it had agreed and bound itself to do by said Letter Agreement, and, in so doing, acted pursuant to the obligation of the Letter Agreement."

Judge Whelan concurrently set down plaintiff's motion for preliminary injunction for hearing. After full hearing on August 4 and 5, 1966, receipt of extensive evidence, and full briefing, the District Court denied a preliminary injunction with a reported opinion (*United States v. Phillips Petroleum Co. and Tidewater Oil Co.,* 1966 Trade Cas. ¶ 71,872) and upon a full set of findings (App. C), from which we have quoted.

Later, September 30, 1967, Tidewater merged into Getty Oil Company (App. E). Tidewater thus exists for the purpose of this case alone.[6] Any relief which could lawfully be issued against

5. The case had been assigned to the Honorable Francis C. Whelan, District Judge, but Judge Whelan was attending the Judicial Conference of the Ninth Circuit at Newport Beach, California, and the application came on before Judge Carr.

6. F.R. Civ. P. Rule 25(c) provides that in case of any transfer of interest by a party, the action may be continued against the party unless the court on motion directs the transferee to be substituted or joined. According to *DeVilliers v. Atlas Corp.,* 360 F.2d 292 (10 Cir. 1966), a corporate merger is a transfer of interest within the meaning of Rule 25 (c). Both Tidewater and Getty were Delaware corporations, and Del. Corp. Code § 261 provides that in an action against a corporation thereafter merged into another, the surviving corporation may be substituted or the action proceed against the original party.

Tidewater—and the gist of our contention is that none can be—would thus be visited upon Getty Oil Company. After the denial of the temporary injunction the case has proceeded as one to compel divestiture by Phillips of the acquired assets. Settlement discussions took place between plaintiff and Phillips, from which Tidewater was excluded, and Tidewater (Getty) has been wholly inactive except to respond to plaintiff's request for production of documents.

In April, 1971, plaintiff informed the District Court that it had completed its discovery and was ready to go to trial. Thereupon Tidewater filed notice of its motion to dismiss (App. D)

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

This motion the District Court denied, and from the order of denial Tidewater seeks leave to appeal. In denying the motion the Court said (App. F):

> "THE COURT: I am going to deny the motion, Mr. Lasky. I feel that there is sufficient authority in the law and sufficient power in the court to keep Tidewater as a defendant, a party defendant.
>
> However, I do recognize that the course of the trial will depend upon the correctness of my ruling.
>
> And therefore I will issue an order making my ruling appealable.
>
> * * *
>
> *Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit.*"

II.

STATEMENT OF THE QUESTION

1. On the merits the question is this:

> Does Section 7 of the Clayton Act address itself at all to the seller of assets or does it not impose all its prohibitions on the buyer alone? Consequently, after a sale of assets has been consummated, can any relief be granted against the seller? Is it not improper to retain the seller in the case and subject it to the burden and expense of trial?

This case involves no question under Section 1 of the Sherman Act.[7] Nor is it a case where the consideration received by the seller includes shares of the buyer whereby the seller would also be an acquirer.

2. There is a jurisdictional question which we present in Part IV below.

III.

THE REQUISITES FOR AN INTERLOCUTORY APPEAL ARE PRESENT

We submit that the requisites for an interlocutory appeal under 28 U.S.C. § 1292(b) are present.

A. Substantial Ground for Difference of Opinion

The element of "substantial ground for difference of opinion" is more than present; we submit that the decision below lacks any basis at all.

By its plain language, Section 7 is aimed only at the buyer:

> "[N]o corporation . . . shall acquire the whole or any part of the assets of another corporation . . ."

In *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (1967), the Fifth Circuit said:

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7. The complaint invokes only Section 7 of the Clayton Act (App. B). Therefore Section 1 of the Sherman Act is not relevant. *Times-Picayune v. United States*, 345 U.S. 594, 609, 610.

"Cowles contends that the complaint should be dismissed as to it insofar as the cause of action against it rests on § 7 of the Clayton Act. The argument is that § 7 is directed against the acquiring corporation only and not against the seller. This position is well taken. § 7 by its terms proscribes only the acquiring corporation. There seems to be no decision to this effect but the language of the statute is clear. We thus affirm the dismissal as to Cowles on the § 7 charge."

In *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906 (1968), this Court approved that statement in the *Dailey* case as obvious, in an analogous situation.

"A similar interpretation of Section 7 of the Clayton Act (15 U.S.C. § 18) was made in Dailey v. Quality School Plan, Inc., 380 F.2d 484, (5th Cir. 1967) where the Court held that Section 7 forbidding certain acquisitions applied only to an acquiring corporation and not to the corporation being acquired."

The Federal Trade Commission reached exactly the same conclusion, *In Re Dean Foods,* Trade Reg. Rep., 1965-1967 Transfer Binder, ¶ 17,765 (1966), where it said (p. 23,116):

"We agree with the hearing examiner and with Bowman [the selling corporation] that Bowman was not a proper party to the Section 7 charge and that the complaint should be dismissed as to Bowman with respect to this charge.

* * *

"It is clear under the language of this section that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company."[8]

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8. The textwriters are in accord: Handler, Annual Review of Antitrust Developments, 15 Record of the Association of the Bar of the City of New York, 362 at 387 (in 1960):

"The statute is clear on its face. And for once nobody disputes its clarity. No one has suggested that a seller can run afoul of Section 7. Nor is there anything in the legislative reports indicating a purpose to reach sellers."

This is not a case where parties hurry to conclude a transaction before the matter can be subjected to judicial scrutiny. Here Tidewater first postponed the closing date at the request of the Department of Justice and then further refrained from consummating the sale, despite the fact that it was under no restraint, until the Court had brought to bear its judicial faculties and had held that nothing stood in the way. Therefore cases like *Jones v. Securities Exchange Commission,* 298 U.S. 1, 17, 18 (1936) are inapplicable.

Nor does this case involve any question about the propriety of joining a prospective seller as a defendant in a suit instituted to enjoin the sale *before* it is consummated and keeping it a defendant *so long as consummation does not occur.* At *that stage,* not joining the seller as a party could be erroneous as denying to the seller a right to be heard on a matter affecting its interests, since an injunction against the buyer's consummating the purchase would deprive the seller of his rights under the contract. In that situation, the seller would be entitled to demand to be heard (F.R.Civ.P.Rule 19(a)(2)). But, once the court has denied an interlocutory injunction and the sale is consummated, the seller no longer has any interest to be preserved, and no claim for relief exists against it.

For some years the Antitrust Division has toyed with a contention that relief can be granted against the seller. But no court has ever sustained that contention. In *United States v. Reed Roller Bit Co.,* 274 F.Supp. 573 (W.D. Okla. 1967), the Antitrust Division contended that the court could order rescission and compel the seller to buy back the property, but the District Court expressly declined to answer that contention for it found nothing in the facts that would warrant a rescission even if it had the power to do so.

Were the contention that a rescission could be ordered upheld, there would be a mad paradox. The buyer, whose conduct alone is proscribed by law, would run no risks; the seller whose

conduct is not proscribed by law, would be saddled with them. That is to say, if an acquisition were upheld, the buyer would benefit from his bargain; if it were held illegal, he would be restored to his position prior to the purchase, while the seller would have to take back the property. Phillips would be delighted (App. F., p. 32.)

[Part of pp. 9 and 10 deleted]

IV.

THE JURISDICTION OF THIS COURT

Because the United States is the plaintiff and this is an antitrust suit, a jurisdictional question is present.

The Expediting Act of 1903 (15 U.S.C. § 29) provides:

> "In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, *an appeal from the final judgment* of the district court will lie only to the Supreme Court."

Thus the Supreme Court has exclusive jurisdiction of appeals from *final* orders in antitrust suits by the government. No interlocutory appeal can be taken to the Supreme Court because the sole provisions of the Judicial Code for appeals from interlocutory orders relate to the Courts of Appeals. 28 U.S.C. § 1292.

The question posed by these facts is whether antitrust suits by the government are so different from other litigation that no interlocutory appeal under 28 U.S.C § 1292(b) lies to any court. If such an appeal does not lie to a Court of Appeals, it does not lie at all.

[Remainder of p. 11 and pp. 12 to 17 deleted]

CONCLUSION

Our petition poses *two* important questions in antitrust law. Each is so important as to justify careful judicial consideration. For the foregoing reasons, we respectfully submit that this Court should grant leave to Tidewater under 28 U.S.C. § 1292(b) to appeal the ruling of the District Court denying Tidewater's motion to dismiss.

Dated: June 30, 1971.

MOSES LASKY
BROBECK, PHLEGER & HARRISON
R. D. COPLEY, JR.
C. LANSING HAYS, JR.
HECHT, HADFIELD, HAYS, LANDSMAN & HEAD

Attorneys for Defendant-Petitioner Tidewater Oil Company and Getty Oil Company

Appendix A

[To Petition for Permission to Appeal]

[Names and Addresses of Attorneys Omitted]

United States District Court
Central District of California
Civil No. 66-1154-WJF
Filed: Jun 24, 1971

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY and TIDEWATER OIL COMPANY,
Defendants.

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER SECTION 1292(b) OF TITLE 28 OF THE UNITED STATES CODE

The motion of defendant Tidewater Oil Company ("Tidewater") for dismissal upon the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater to defendant Phillips Petroleum Company ("Phillips") has long ago been consummated, that no relief is obtainable against Tidewater, and that its presence in the suit is no longer necessary or appropriate, having duly come on for hearing on June 14, 1971; the Court having heretofore denied plaintiff's application for a temporary restraining order, thus permitting Tidewater's sale of assets to Phillips to be consummated, as found by the Court (Findings 5 and 6 entered November 7, 1966) upon denial of plaintiff's motion for a preliminary injunction.

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The motion of Tidewater for dismissal is denied

2. The Court finds that its order denying defendant Tidewater's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation. This Court, therefore, certifies its order denying defendant's motion to dismiss for interlocutory appeal under Section 1292(b) of Title 28 of the United States Code.

Dated: June 24, 1971.

WARREN J. FERGUSON
United States District Judge
[Approvals by counsel deleted]

Appendix B

[To Petition for Permission to Appeal]

Harry W. Cladouhos
Department of Justice, Antitrust Division
1546 U.S. Post Office and Court House
Los Angeles, California 90012
688-2500

United States District Court
for the Southern District of California
Central Division
Civil No. 66-1154-FW
Filed: July 13, 1966

United States of America,
Plaintiff,

v.

Phillips Petroleum Company
and Tidewater Oil Company,
Defendants.

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 15 of the Act of Congress of October 15, 1914, c.

323, 38 Stat. 736, as amended, 15 U.S.C. § 2[illegible], entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act.

2. Tidewater Oil Company maintains its principal offices and transacts business within the Southern District of California.

II.

DEFENDANTS

3. Phillips Petroleum Company, hereafter referred to as "Phillips", is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware, and has its principal offices at Bartlesville, Oklahoma.

4. Tidewater Oil Company, hereafter referred to as "Tidewater", is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware, and has its principal offices at 4201 Wilshire Boulevard, Los Angeles, California.

III.

DEFINITIONS

5. (a) As used herein, the term "five western states" means the states of California, Oregon, Washington, Nevada and Arizona.

(b) Each reference hereinafter to Phillips or to Tidewater includes the subsidiaries thereof.

IV.

NATURE OF TRADE AND COMMERCE

6. Phillips and Tidewater are each integrated oil companies, being engaged in the acquisition of oil and gas lands; the production of crude oil, natural gas and natural gas liquids; the manu-

facture of refined petroleum products; and the transportation and marketing of crude oil and the products derived therefrom.

7. The nineteen largest integrated oil companies in the United States, commonly referred to as the major oil companies, including Phillips and Tidewater, directly or indirectly, produce over half the crude oil produced in the United States; own over 82% of the refining capacity and account for over 87% of the refinery runs in the United States; either own or control the major part of the interstate pipeline facilities for the transportation of crude oil and refined petroleum products in the United States; and market approximately 68% of the gasoline sales in the United States.

8. Seven major oil companies, including Tidewater, produce approximately 60% of the crude oil produced in the five western states; own over 84% of the refining capacity and account for about 87% of the refinery runs therein; and market approximately 78% of the motor gasoline sales therein.

9. Seven major oil companies, including Tidewater, produce over 61% of the crude oil produced in California; own over 83% of the refining capacity and account for approximately 85% of the refinery runs therein; and market approximately 80% of the motor gasoline sales therein.

10. California is the most attractive, largest and fastest growing market in the country with respect to motor gasoline sales. For many years California has consistently led all other states with respect to motor vehicle registrations and consumption of motor gasoline. In 1965, California led all states in motor vehicle registrations with about 9.9 million, or 11% of total registrations in the United States and about 4 million more than New York, the second leading state. In 1965, motor gasoline consumption in California was 170.9 million barrels, or about 10% of total consumption in the country and about 62.6 million barrels more than that of New York, the second leading state.

11. As of December 31, 1965, Phillips had total assets of over $2 billion, ranking 8th in total assets among domestic oil

companies. In 1965, it had gross revenues of approximately $1.4 billion and net profits of over $127 million, ranking 10th and 8th, respectively, among domestic oil companies.

12. As of December 31, 1964, Phillips had net owned proved domestic reserves of crude oil and condensate estimated at 427,034,880 barrels or approximately 1.4% of such domestic reserves. In 1965, Phillips' domestic crude oil, condensate and natural gas liquids production was 241,700 barrels daily, or 2.7% of such domestic production, ranking 8th among domestic producers. Phillips produces crude oil in most of the producing states of the United States, including Alaska and California. It owns and operates six domestic refineries having a total operating capacity of 289,000 barrels per day, or 2.9% of such total domestic capacity, ranking 11th among domestic refiners. In 1965, Phillips' crude refinery runs amounted to 249,000 barrels per day, or 2.8% of such total domestic runs, ranking 12th among domestic refiners. In 1965, Phillips sold almost 4.0% of the total tax-paid motor gasoline sales in the United States. Phillips currently markets its own brand name refined petroleum products, including motor gasoline, through more than 19,000 service stations.

13. From a small area overlapping parts of Kansas and Oklahoma, Phillips has, since 1927, expanded its marketing of refined petroleum products, including motor gasoline, into all states of the United States, except Alaska, California and Hawaii, ranking, in 1965, among the top ten companies with respect to motor gasoline sales in thirty such states. This expansion was particularly accelerated following World War II. Since then, Phillips has entered at least 27 states, including those four of the five western states in which it currently markets. Phillips has the capability of substantially increasing its motor gasoline sales in the five western states and could reasonably be expected to do so absent the acquisition referred to in paragraph 22 of this complaint. Phillips also has the capability of entering the

California market on a substantial scale with respect to motor gasoline sales and, absent said acquisition, would be a reasonably probable entrant. Phillips is one of the few substantial potential entrants into the highly concentrated California market.

14. Tidewater is one of the leading integrated companies in the petroleum industry. Getty Oil Company, through stock ownership, has the power to control the operations and policies of Tidewater, Skelly Oil Company, Mission Corporation, and Mission Development Company. Getty Oil Company is a nonintegrated producer of crude oil and natural gas in the United States and several foreign countries. Skelly Oil Company is an integrated petroleum company whose operations are carried on principally in the mid-continent area of the United States and in Canada. Mission Corporation and Mission Development Company are primarily holding companies. The combination of the Getty interests would rank 13th among the domestic petroleum companies in total assets.

15. As of December 31, 1965, Tidewater had total assets of almost one billion dollars, ranking 15th among domestic major oil companies. In 1965, it had gross revenues of $834 million and net profits of approximately $56 million, ranking 15th and 16th, respectively, among domestic oil companies.

16. As of December 31, 1964, Tidewater had net owned proved domestic reserves of crude oil and condensate estimated at 652,847,000 barrels, or 2.1% of such total domestic reserves. In 1965, Tidewater's domestic crude oil, condensate and natural gas liquids production was 149,000 barrels daily, or 1.7% of such total domestic production, ranking 14th among domestic producers. Tidewater is the third largest producer of crude oil in California and in the five western states. It also has substantial crude oil production in the states of Texas and Louisiana. Tidewater's operating refining capacity amounts to 260,000 barrels per day, or 2.6% of such total domestic capacity, ranking 12th among domestic refiners. In 1965, its crude refinery runs were

192,778 barrels daily, or 2.1% of such total domestic runs, ranking 15th among domestic refiners. In 1965, Tidewater sold approximately 2.1% of the total tax-paid motor gasoline sales in the United States. Tidewater markets its brand name refined petroleum products, including motor gasoline, in nineteen states and the District of Columbia, primarily on the east and west coasts.

17. In 1965, Tidewater and Phillips sold approximately 706 million and 59 million gallons of motor gasoline in the five western states having a retail value of approximately $41 million and $12 million, respectively.

18. In 1965, Tidewater's and Phillips' shares of motor gasoline sales in the five western states were 7.1% and .6% respectively. Their respective shares of motor gasoline sales in each of said states were: California—6.8% and 0%; Oregon—5.4% and .6%; Washington—4.3% and 2.3%; Arizona—.7% and 2.8%; and Nevada—5.8% and 4.6%.

19. Tidewater has for many years sold substantial quantities of unbranded motor gasoline to independent rebranders or marketers for resale under their private brand names. These independent rebranders or marketers generally sell motor gasoline to the consumer at one cent or two cents a gallon below the prevailing price of brand name motor gasoline sold by the major oil companies. In 1965, Tidewater's sales of motor gasoline to such rebranders or marketers in the five western states and in California amounted to approximately 157 million gallons and 140 million gallons, having a resale value of approximately $31 million and $29 million, respectively. Tidewater's sales of motor gasoline to such rebranders or marketers in the five western states and in California accounted for approximately 13% and 18%, respectively, of the total motor gasoline sales by such rebranders or marketers in the five western states and in California.

20. The number of independent refiners in the California market has declined from 27 in 1947 to only seven in 1965. The

percent of total operating refining capacity in that market owned by said refiners declined from 16.2% to 5.5% during the same period. Independent refiners constitute a substantial source of motor gasoline supplies for independent rebranders or marketers in said market.

21. Substantial quantities of refined petroleum products, including motor gasoline, are manufactured by Phillips and Tidewater and are distributed and sold in interstate commerce by each such company in states other than those in which said products were manufactured.

V.

OFFENSE CHARGED

22. On March 29, 1966, Phillips and Tidewater entered into a Letter Agreement providing for the sale by Tidewater to Phillips of substantially all the manufacturing, marketing and transportation assets and operations of Tidewater's Western Marketing a Manufacturing Division located in the states of Arizona, California, Hawaii, Idaho, Nevada, Oregon and Washington for a consideration of approximately $325 million. The agreement further provides that Phillips will pay Tidewater an amount equal to the value of Tidewater's inventory of crude, products, material and supplies on hand at the transfer date, the estimated value of which is approximately $60 million.

23. The Tidewater assets to be acquired by Phillips include among others: a 135,000 barrel-per-day refinery at Avon, California, which manufactures a complete line of refined petroleum products; 13 product terminals; 219 bulk plants; 3,654 retail outlets; Seaside Oil Company, Tidewater's wholly owned marketing outlet for off-brand product sales; all transportation facilities relating to Tidewater's western division marketing and manufacturing operations, such as pipelines and five tankers; and Tidewater's office building in Los Angeles, California.

24. The acquisition of Tidewater's Western Marketing and Manufacturing Division assets and operations pursuant to the agreement described in paragraph 22 may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following manner:

(a) Actual and potential competition between Phillips and Tidewater in the sale of motor gasoline in the five western states and in California will be eliminated;

(b) Competition generally in the sale of motor gasoline in the five western states and in California may be substantially lessened; and,

(c) A substantial source of motor gasoline for independent rebranders or marketers in the five western states and in California may be eliminated.

VII.

PRAYER

WHEREFORE the plaintiff prays:

(1) That a preliminary injunction be issued against Phillips and Tidewater preventing and restraining them from taking any action in furtherance of the agreement described in paragraph 22, or any similar agreement, pending final adjudication on the merits of this complaint;

(2) That pursuant to Section 15 of the Clayton Act, the Court order summons to be issued to the Phillips Petroleum Company commanding it to appear and answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as this Court may make in the premises;

(3) That the proposed acquisition of Tidewater's Western Marketing and Manufacturing Division assets and operations be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act;

(4) That Phillips and Tidewater and all persons acting on their behalf be perpetually enjoined from carrying out the agreement described in paragraph 22, or any similar agreement;

(5) That Tidewater be enjoined from selling or otherwise disposing of its Western Marketing and Manufacturing Division assets and operations, or any part thereof, to any major oil company engaged in the marketing of motor gasoline in the five western states, or any part thereof, without the consent of plaintiff or a showing to the court that said sale or other disposition will not substantially lessen competition;

(6) That plaintiff have such other, further, general, and different relief as the nature of the case may require and the Court may deem proper in the premises; and,

(7) That the plaintiff recover its taxable costs.

[Signatures of Counsel for Plaintiff and Verfication Omitted]

Appendix C to the Petition for Permission to Appeal consists of the "Findings of Fact and Conclusions of Law in re Motion for Preliminary Injunction and Order" in the District Court. A copy is printed as Appendix C to the Petition for a Writ of Certiorari in this cause and is incorporated herein by reference.

Appendix D to the Petition for Permission to Appeal consists of the Notice of Motion by Tidewater Oil Company for Dismissal in the District Court. A copy is printed as Appendix D to the Petition for a Writ of Certiorari in this cause and is incorporated herein by reference.

Appendix F to the Petition for Permission to Appeal consists of excerpts from the Reporter's Transcript of Proceedings in the District Court on June 14, 1971. Portions are printed in Appendix E to the Petition for a Writ of Certiorari in this cause and are incorporated herein by reference.

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1970

No. .....

71 - 366

TIDEWATER OIL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

TIDEWATER OIL COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

Tidewater Oil Company prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit in *Tidewater Oil Company,* Defendant-Petitioner vs. *United States of America,* Plaintiff-Respondent, and *Phillips Petroleum Company, Defendant-Respondent,* No. Misc. 5741.

OPINION

The opinion of the court below is not yet reported. It is set out in Appendix A hereto.

All emphasis in quotations has been added, unless otherwise stated.

No formal opinion was rendered by the district court, but pertinent excerpts from the reporter's transcript of its oral remarks are set out in Appendix E hereto. An earlier opinion on another phase of the case is reported, *United States v. Phillips Petroleum Company and Tidewater Oil Company,* 1966 Trade Cas. ¶ 71,872.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The district court had jurisdiction under the Clayton Act, §§ 7 and 15, Act of October 14, 1914, c. 323, 38 Stat. 736, as amended, 15 U.S.C. §§ 18 and 25.

The jurisdiction of the Court of Appeals is the question in issue, under 28 U.S.C. §1292(b). Its order was rendered July 28, 1971.

QUESTION PRESENTED

In a civil action brought in a district court by the United States under Section 7, Clayton Act, (15 U.S.C. § 18), does a Court of Appeals have jurisdiction to entertain a petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the district court which certifies that it involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation?

The right to appeal to a Court of Appeals under 28 U.S.C. 1292(a) — as distinguished from 1292(b) — is not involved.

STATUTES INVOLVED

Section 7, Clayton Act, Act of Oct. 14, 1914, c. 323, 38 Stat. 736, as amended, 15 U.S.C. § 18:

> "* * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the

country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

28 U.S.C. § 1292(b) (Interlocutory Appeals Act, 1958):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The Expediting Act of 1903, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended (15 U.S.C. § 29):

"In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

STATEMENT OF THE CASE

This petition concerns reviewability of an order denying a party's motion to dismiss where keeping it in or letting it out will drastically change the progress of the case. Denying the motion, the district court volunteered that it would certify its order for appeal, saying:

"* * * I do recognize that the course of the trial will depend upon the correctness of my ruling.

"And therefore I will issue an order making my ruling appealable.

* * *

"Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit."

In March, 1966, petitioner ("Tidewater") contracted with respondent Phillips Petroleum Company ("Phillips") to sell to Phillips certain western assets on June 30, 1966. At the request of the Antitrust Division of the Department of Justice, Tidewater and Phillips voluntarily postponed the consummation to 7 A.M. (P.D.T.), July 14, 1966. On July 13, 1966, the United States filed a complaint in the district court in Los Angeles against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Section 7 of the Clayton Act, and plaintiff applied to the court for a temporary restraining order against the consummation of the transaction pending hearing on a motion for preliminary injunction.

Because of absence of the judge to whom the case had been assigned, the application could not be heard until after the hour set for consummation the next day. However, Tidewater and Phillips, "in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination". The court "denied the requested restraining order, thus permitting the transaction to be closed". Later, after receipt of extensive evidence, plaintiff's motion for a preliminary injunction was denied with opinion (1966 Trade Cas. ¶ 71,872) and upon a full set of findings.[1]

Restraint having been denied, Tidewater sold the agreed assets and transferred title to Phillips. The case then proceeded as one to compel divestiture by Phillips of the acquired assets, and Tidewater was wholly inactive in the case except to respond to plaintiff's discovery.

In April, 1971, plaintiff informed the district court that it had completed its discovery and was ready to go to trial. Thereupon Tidewater moved to dismiss, as against it,[2]

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the

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1. Those findings are set out in App. C. hereto and are the source of the facts stated above.

2. The motion is set out in App. D. hereto.

seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."[3]

The district court denied the motion, and its formal order (App. B hereto) included the certification for interlocutory appeal under 28 U.S.C. § 1292 (b). Within the time provided by that section, on June 30, 1971, Tidewater filed its petition in the court below for permission to appeal under 1292(b).

On July 28, 1971, the court below denied the petition by an order and opinion of one sentence. Omitting the caption, it reads thus:

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3. The proposition asserted in support of the motion is sustained by the authorities:

Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5 Cir. 1967):

"The argument is that § 7 is directed against the acquiring corporation only and not against the seller. This position is well taken. § 7 by its terms proscribes only the acquiring corporation. * * * the language of the statute is clear. We thus affirm the dismissal as to Cowles on the § 7 charge."

In Re Dean Foods, Trade Reg.Rep., 1965-1967 Transfer Binder, ¶ 17,765, the Federal Trade Commission said (p. 23,116):

"* * * Bowman [the selling corporation] was not a proper party to the Section 7 charge and * * * the complaint should be dismissed as to Bowman with respect to this charge.

* * *

"It is clear under the language of this section that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company."

Accord: *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906 (9 Cir. 1968).

Handler, Annual Review of Antitrust Developments, 15 Record of the Association of the Bar of the City of New York, 362 at 387 (1960):

"The statute is clear on its face. And for once nobody disputes its clarity. No one has suggested that a seller can run afoul of Section 7. Nor is there anything in the legislative reports indicating a purpose to reach sellers."

> "The petition for leave to appeal under 1292(b) is denied. *United States v. Ford* [*sic*] *Machinery Corporation*, 9 Cir., 321 F.2d 534."

The appeal in the cited case (the correct designation of which is *United States v. FMC Corp.*, 321 F.2d 534) was "taken [by the United States] under 28 U.S.C. § 1292(a)(1) from an order denying a motion for a preliminary injunction". After stating the nature of the case and of the appeal, the opinion and order there said:

> "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act 1903 (c. 544, 32 Stat. 823) now 15 U.S.C. § 29. See [citations]. We are unable to agree with the contrary decision of the Third Circuit in United States v. Ingersoll-Rand Co., 1963, 320 F.2d 509 (June 5, 1963)."

The court below thus made clear that its reason for denying Tidewater leave to appeal here was *solely its belief that it lacked jurisdiction.*

REASONS FOR GRANTING A WRIT

The present petition for certiorari does not raise the question whether the court below should have granted leave to appeal. The question we present is whether it had jurisdiction to do so. Should this Court sustain that jurisdiction, the case would be remanded for the court below to act upon the merits of the petition for leave to appeal. Where a court fails to exercise a discretion reposed in it by law, as with respect to allowing an appeal, in the erroneous belief that it lacks jurisdiction to do so, this court on certiorari[4] can direct it to do so, *In re 620 Church St. Corp.*, 299 U.S. 24, 26 (1936); *House v. Mayo*, 324 U.S. 42, 44 (1945), the direction being that it render a decision not in "any

4. It could also do so by mandamus. *Work v. Rives*, 267 U.S. 175 (1925).

particular way but only that it be made one way or the other". *Work v. Rives,* 267 U.S. 175, 184 (1925); *Brown v. Fletcher,* 237 U.S. 583 (1915).

The question is an important one of federal law, it has never come before this Court, and it cries to be settled. It has never received analysis by any court, and it is inconceivable how it can ever be resolved except on a grant of certiorari in a proceeding just like this. Moreover, it was decided below solely on the basis of assumed identity with the question of appeals under 28 U.S.C. 1292(a), and, on that question, there is a conflict among the circuits. The First and Ninth[5] hold one way, and the Third another.[6] As we show below, the question of interlocutory appeals under § 1292(b) is not the same as under § 1292 (a). But if there were identity, then there is conflict among the circuits.

This Court has often observed how much its work is eased by having cases screened through the Courts of Appeal. *United States v. Ballard,* 322 U.S. 78, 88 (1944); *United States v. Sheridan,* 329 U.S. 379, 392 (1946). By the time § 1292(b) was first enacted (in 1958), doubt was growing about the wisdom of departing from that practice in antitrust cases and in routing them directly to this Court. Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 175n (1963), the Court said:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

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5. *United States v. Cities Service Company,* 410 F.2d 662 (1 Cir. 1969); *United States v. FMC Corp.,* 321 F.2d 534 (9 Cir. 1963).

6. *United States v. Ingersoll-Rand Co.,* 320 F.2d 509 (3 Cir. 1963)

Expedition, it was coming to be believed, was better secured by screening cases through the Courts of Appeals.[7]

While courts cannot create a jurisdiction not created by Congress, however desirable, what Congress has conferred they should not reject. 28 U.S.C. 1292(b) is a modern innovation serving the desirable purpose and enacted over 50 years after the Expediting Act. That section manifests the entirely modern view that interlocutory appeals on important issues are a useful updating of judicial administration. Yet, if no such appeal can be taken to a Court of Appeals under § 1292(b) in a government antitrust suit, that useful device is denied to government antitrust litigation, for no interlocutory appeal lies to this Court.

It is imperative to observe that two entirely different kinds of interlocutory appeals are provided by the judicial code, each with a different language, history and purpose. The first and earliest in time is covered by 28 U.S.C. § 1292(a) and relates to certain collateral proceedings in a case — orders granting or denying interlocutory injunction or relative to receiverships.[8] The second is provided for in 28 U.S.C. § 1292(b) and relates, not to collateral matters, but to important questions in the direct stream of the case,

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7. Mr. Justice Clark had made similar observations in a concurring opinion, *Brown Shoe Co. v. United States*, 370 U.S. 294, 355, 364 (1962), as had Mr. Justice Harlan in *United States v. Borden Co.*, 370 U.S. 460, 477 (1962).

8. Apart from certain patent and admiralty matters.

§ 1292(a) reads:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:"

which, if properly determined early, will save time and energy of courts and litigants.

The history of § 1292 (a) has led some courts to deny jurisdiction of appeals under that section to Courts of Appeals in government civil antitrust actions. But the language, history and purpose of 1292(b) are totally different. And the question is whether anything in *that* language, history and purpose defeats its salutary application.

Language of § 1292(b)

The necessary place to start, if not to end, analysis is the language of the pertinent statutes.

The Expediting Act of 1903 (15 U.S.C. § 29) provides that in civil actions by the United States under the antitrust acts,

> "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court."

28 U.S.C. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable . . . [shall make the proper certification] * * * The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

Thus, § 1292(b) by its language applies to *any* civil action, and the Expediting Act relates only to appeals from *final* judgments. Looking solely to the language of the two statutes, the Expediting Act is no bar to an interlocutory appeal under § 1292(b).

In *United States v. Cities Service Company,* 410 F.2d 662, 670n (1 Cir. 1969), the First Circuit, while holding that the Expediting Act precludes an interlocutory appeal to a Court of Appeals under 1292(a), had this to say, albeit by way of dictum, of 1292(b):

> "It is at least arguable that by its literal terms the certification procedure of § 1292(b) permits interlocutory appeals in government antitrust cases since § 1292(b) covers appeal not

> otherwise allowed by § 1292(a). *See* Comment, The Antitrust Expediting Act—A Critical Reappraisal, 63 Mich. L. Rev. 1240, 1245 n. 48 (1965). Moreover, § 1292(b) appeals do not suspend a consideration of the merits unless a stay is issued by the court of appeals. On the other hand § 1292(b) appeals would involve possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court. Unfortunately, the legislative history of § 1292(b) provides no illumination on a resolution of these interests."

We consider below the "possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court". Policy means Congressional intent, and that must be gathered in the first instance from statutory language. The supposed "possible policy" referred to in the quotation is derived from the history, purpose and language of interlocutory appeals under what is now 1292(a), and that, as we show by a brief review below, is completely inapplicable.

Purpose of Section 1292(b).

The conclusion mandated by the language is supported by the purpose of § 1292(b). That statute, enacted in 1958, created an entirely new practice. Its genesis and the impetus for its enactment were the recognition that there are unusual situations where an interlocutory appeal will expedite litigation rather than impede it. The Senate Report on the bill that became § 1292 (b) stated:[9]

> "This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. * * * The bill results from a growing *awareness of the need for expedition*

9. Senate Report No. 2434, August 18, 1958, 3 U.S. Code Congressional and Administrative News, 85th Cong., 2nd Sess.

of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable".[10] (p. 5256)

* * *

"The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. * * * Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." (p. 5257).

As a most vivid example of cases calling for interlocutory appeals, the report pointed to antitrust, saying:

"There are many civil actions from which similar illustrations could be furnished. For example, *in an antitrust action* a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. *Disposition of antitrust cases may take considerable time,* yet upon appeal following final disposition of such cases the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." (P. 5256).

The genesis and impetus of the Expediting Act are exactly the same, namely, to expedite litigation and not impede it. The Expediting Act was motivated by the view that government antitrust

10. So here; had the district court granted Tidewater's motion to dismiss, its order would have been appealable as final.

cases are of such importance that they should be expedited, *Shenandoah Broadcasting v. Ascap*, 375 U.S. 39 (1963); *United States v. Cities Service Co.*, 410 F.2d 662, 664 (1 Cir. 1969). In reporting the bill that became the Expediting Act, Senator Fairbanks said (36 Cong.Rec. 1679):

> "* * * every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object."

It has been remarked: "The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision. Experience with that section has shown the wisdom of the Congressional decision." 5 Harvard Journ. on Legislation 55, 64 (1967).

The provision about appeals is Section 2 of the Expediting Act. Section 1 of the same Act provided that government antitrust cases would be heard by a panel of judges upon the certificate of the attorney general. This is now 15 U.S.C. § 28, which provides for a panel of three. The House Report on the bill[11] explains this provision by quoting a letter of the attorney general as follows:

> "There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts,
>
> * * *
>
> "The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of circuit judges *would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals.*"

Permitting interlocutory appeals under 28 U.S.C. § 1292(b) will serve both the purpose of speeding litigation and of giving the

11. House Report No. 3020, 57 Cong., 2nd Sess., January 9, 1903.

case a screening before issues reach this Court. Thus § 1292(b) and the Expediting Act are animated and informed by precisely the same objectives and warranted by precisely the same circumstances. They should be read together as supplementing each other, not read as antagonistic. And if any repugnancies were present, the later Act would necessarily control all intendments. *United States v. Yuginovich,* 256 U.S. 450, 463 (1921); *United States v. Tynen,* 78 U.S. 88, 92 (1870).

The Contrast With the Language and History of 1292(a)

28 U.S.C. § 1292(a) is derived from the Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7). That Act provided as follows:

> "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, *in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals,* an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: * * *."[12]

Since the Evarts Act, as enacted in 1891 and amended in 1900, provided in as plain language as possible for certain interlocutory appeals to a Court of Appeals only in cases "in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals", and since the Expediting Act deprived the Courts of Appeals of jurisdiction over appeals from final judgments in government instituted antitrust cases, upon enactment of the Expediting Act the language of the Evarts Act ceased to provide for interlocutory appeals.

Thus, at its birth, the Expediting Act plainly deprived Courts of Appeal of jurisdiction over 1292(a) type of interlocutory

12. By the Act of June 6, 1900, c. 803, 31 Stat. 660, the Evarts Act was amended to extend to orders concerning receivers. The language "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals" remained.

appeals—the only kind then authorized—in government antitrust suits. The debate has turned on whether subsequent textual changes altered the law on 1292(a) appeals.

In 1906 the Evarts Act was amended[13] to substitute the words "in any cause" for the words "in a cause in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals". Not until the Act had been amended again was the question raised, years later, whether the 1906 change expanded the reach of the Evarts Act. Upon the basis of the history of the peculiar purpose and motivation of the 1906 amendment as being to defeat certain evasive tactics in pleading, and noting that the amendment was enacted only 3 years after the Expediting Act, yet without referring to it, courts concluded that the 1906 amendment was not intended to effect that expansion (see *United States v. Cities Service Company*, 410 F.2d at 666-67).

The phrasing was again changed in 1911 upon codification of various statutes into the Judicial Code. Section 7 of the Evarts Act became Section 129 of the Code (36 Stat. 1087, 1134), and the words "in any cause" were replaced by the words "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court". The new phrasing did not say "notwithstanding an appeal . . . might, upon final decree . . . be taken *only* to the Supreme Court". In *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 512 (1963), the Third Circuit held that the 1911 change "assuredly had the effect" of making interlocutory injunctive and receivership orders in government antitrust suit appealable to Courts of Appeal. The First Circuit, in the *Cities Service* case, 410 F.2d at 667, held otherwise, because, while "the language is sweeping", there was "no indication that any substantive change in the Expediting Act

13. By the Act of April 14, 1906, 34 Stat. 116.

was intended. Nor, apparently, was any attempt made to take advantage of the language".

In this state of the statutes, *United States v. California Canneries*, 279 U.S. 553 (1929), was decided. There, long *after* a final decree in a government antitrust suit,[14] California Canneries sought to intervene to move to vacate the final decree. On appeal in 1924 the Court of Appeals for the District of Columbia reversed an order denying intervention. On certiorari this Court held that the Court of Appeals had no jurisdiction. In doing so it added (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

This last clause was dictum, because the order appealed from was *not* interlocutory at all. It was a post-judgment order, and, as such, historically considered a final order for purposes of appeal.[15] Orders denying interventions after a judgment decreeing an acquisition to be illegal are appealable directly to this Court as final orders. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S.

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14. *Swift & Co. v. United States*, 276 U.S. 311 (1928).

15. A decree, like that in *Swift & Co. v. United States, supra*, that an acquisition is illegal and must be undone, is final for appeal to this Court although a plan of divestiture remains to be ordered. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962). The subsequent order putting a plan into effect is also appealable as a final order. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129 (1967). So is a subsequent contempt order. *First Security Nat. Bank v. United States*, 382 U.S. 34 (1965). It is the general rule that post-judgment orders are appealable as final orders, unless they too are merely interlocutory to some post-judgment procedure. 9 Moore's Federal Practice (2d ed.) ¶ 110.14 and cases cited.

129, 132 (1967); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941). Therefore the order denying intervention to California Canneries in the *Swift* case was obviously not appealable to a court of appeals but only to this Court because it was a final order.

In 1925, 43 Stat. 936, 937, inaugurating this Court's certiorari jurisdiction, re-codified the Judicial Code and deleted the "notwithstanding" clause of Section 129 of the Judicial Code of 1911. According to a memorandum accompanying the bill, the "notwithstanding clause" was "eliminated as having no further application in view of the repeal of the existing provisions of Section 238 providing for direct appeals."[16] This ambiguous explanation left the situation as it had been, that is, in the context of an Act which, when first enacted in 1903, plainly precluded an interlocutory appeal on injunctions to Courts of Appeal. As said in *Cities Service*, at pp. 668-669, "If the 1911 'notwithstanding' language did not create such jurisdiction, then dropping such language because the same coverage could be achieved without it could be no more effective."

The next event was the revision of the Judicial Code in 1948, as Title 28 U.S.C. (62 Stat. 929). The Evarts Act became 28 U.S.C. § 1292(a). As so codified, 1292(a) permits an appeal to a Court of Appeals of interlocutory injunctive and receivership orders "except where a direct review may be had in the Supreme Court". As this Court has review under the Expediting Act only from final judgments, it has none from interlocutory orders. The Third Circuit in *Ingersoll-Rand*, *supra*, therefore held that the 1948 enactment operated to vest jurisdiction in Courts of Appeals over such interlocutory orders in government instituted antitrust cases. Said it (320 F.2d at 517):

> "In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that

16. Cited both in *United States v. Ingersoll-Rand*, 320 F.2d at 512, 513, and *United States v. Cities Service Company*, 410 F.2d at 668-9.

> interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which an interlocutory order is directly reviewable by the Supreme Court."

On the other hand, the First Circuit pointed to the statements in the reviser's notes to the 1948 recodification that no substantial changes were intended, and it cited this Court's decision to the same effect, *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957). Therefore the First Circuit, disagreeing with the Third, held that the 1948 codification effected no change.

In between *Ingersoll-Rand* and *Cities Service*, both containing long discussion, came the decision of the court below in *United States v. FMC Corporation*, 321 F.2d 534 (1963), the basis of its decision in the present case. Without analysis or discussion it stated baldly "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act of 1903". Its authority for this proposition was the *California Canneries* case. Although it also cited four other decisions of this Court, only one, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), could be deemed to contain anything conceivably relevant,[17] and even that case did not involve any question of appeal

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17. The other three were *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944); *United States Alkali Export Association v. United States*, 325 U.S. 196 (1945); and *DeBeers Mines v. United States*, 325 U.S. 212 (1945). None involved an appeal to a Court of Appeals. *Allen Calculator* was an attempt to appeal to this Court an order it held not to be final. The *Alkali* and *DeBeers* cases were attempts to have this Court review interlocutory orders by certiorari to the district court.

The Ninth Circuit's *FMC* opinion also cited three lower court cases. One, *United States v. American Association of Composers, Authors & Publishers*, 317 F.2d 90 (2 Cir. 1963), was promptly reversed in *Shenandoah Broadcasting Co. v. Ascap*, 375 U.S. 39 (1963). Another, *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614, was a 1939 Third Circuit decision, and the Third Circuit's later decision in *Ingersoll-Rand* holds a 1292(a) order appealable to a Court of Appeals. The third, *National Association of Real Estate Boards v. United States*, 176 F.2d 631 (D.C. Cir. 1949), involved an interlocutory order of a kind not within § 1292(a) or its precursors.

to a Court of Appeals. It was a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. In a footnote, constituting a complete aside, it nearly quoted from *California Canneries* (370 U.S. at 305, fn. 9):

> "Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States v. California Cooperative Canneries,* 279 U.S. 553, 558."

Thus, since the 1948 amendment, on appealability in government antitrust suits of interlocutory orders described in § 1292(a), there is conflict among the circuits, the First and Ninth opposed to the Third. The question has not reached this Court. Inasmuch as the Court of Appeals in *Ingersoll-Rand* (1963) affirmed an interlocutory injunction appealed by the defendant, neither party had any incentive to seek review by this Court of the question of appealability. In the *FMC* case, the district court had denied a preliminary injunction against an acquisition, and the United States appealed to the Ninth Circuit. When that court stated that it lacked jurisdiction, the United States applied to Mr. Justice Goldberg for a stay pending a petition for certiorari. When he denied the stay, the acquisition occurred, thus mooting the question so that no petition for certiorari was filed. In his opinion denying the stay, (*United States v. FMC Corp.,* 11 L.Ed.2d 20), Mr. Justice Goldberg, not writing for this Court but as a single circuit justice, concluded that the 1948 revision of the Judicial Code had not altered the previous historical construction of the Expediting Act.

Even the courts voting against appealability of 1292(a) orders consider that conclusion to be unfortunate[18] but compelled by

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18. For example, the First Circuit in the *Cities Service* case, *supra,* remarked (p. 669):

> "We realize that time has made ancient good much less couth than it was in 1903, and that requiring Supreme Court review of

history. The case against appealability of § 1292(a) orders to a Court of Appeals must rest on the statement in *California Canneries,* repeated in the footnote dictum in *Brown Shoe.* It may be granted that *California Canneries,* although dictum, represented the views of this Court, but the views it represented were in a precise historical context, i.e., the state of the statutory law in 1925. As said in *Ingersoll-Rand* (p. 516):

> "The basis for the Supreme Court's decision as stated in California Canneries is perfectly plain. It was that the Expediting Act amended the prior law and did away with appeals from interlocutory orders and decrees in anti-trust suits."

In short, the Expediting Act was enacted after the Evarts Act, and nothing in subsequent amendments, at least until the 1948 revision, showed any Congressional intention to effect a change. The Third Circuit believed that the 1948 amendment did effect a change; the First and Ninth believed not.

Recapitulation as respects 28 U.S.C. § 1292(b)

We turn back to § 1292(b). Whatever may be said about 1292(a), the case as to 28 U.S.C. 1292(b) is clear. It was enacted 55 years after the Evarts Act and 21 years after *California Canneries.* In *California Canneries* this Court was expressing a judgment on what Congress had done, not on what it could do or on the effect of what it would do 21 years later. While *Brown Shoe* post-dates the enactment of § 1292(b) by about four years, the issue of jurisdiction of a Court of Appeals over an interlocutory appeal under 1292(b) was not involved, and the new Act was not before it. Therefore *Brown Shoe* is no authority on that point. *Webster v. Fall,* 266 U.S. 507, 511 (1925); *Nashville Milk Co. v. Carnation*

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final district court actions in government civil antitrust cases and barring any court of appeals review of interlocutory orders make little sense today. The call for another — and hopefully less ambiguous — change in jurisdiction has been sounded on both the judicial and legislative fronts."

Co., 355 U.S. 373, 376, 383 (1958); *United States v. More*, 3 Cranch (7 U.S.) 159, 172.[19]

28 U.S.C. § 1292(b) is the latest expression of Congressional will. It is plain in its language and requires no interpretation from history.[20] There are no chalk marks on the slate of history to obscure its meaning.

In the court below respondent United States cited *Farbenfabriken Bayer, A.G. v. United States*, 1968 Trade Cas. ¶ 72,570 (D.C.Cir.). While that unofficially reported order does not mention § 1292(b), it does appear to deny appealability to a Court of Appeals under that section. The opinion contains no analysis. It is as follows, in full:

> "On consideration of applicant's application for interlocutory appeal, of respondent's opposition thereto and applicant's reply, it is
>
> "Ordered by the Court that applicant's aforesaid application is denied. *Brown Shoe Co. v. United States* [1962 TRADE CASES ¶ 70,366], 370 U.S. 294, 305 n. 9 (1962); *United States v. California Cooperative Canneries*, 279 U.S. 461 (1929); *National Association of Real Estate Boards v. United States* [1948-1949 TRADE CASES ¶ 62,436], 85 U.S. App. D.C. 165, 176 F. 2d 631 (1949).
>
> "Circuit Judge Burger did not participate in the foregoing order."

As we have seen, the cases cited do not support the conclusion.

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19. Indeed, much the same is true as respects appealability under § 1292(a), for that issue was not involved in *Brown Shoe*, and the effect of the 1948 amendment was not before the Court.

20. *Ex parte Collett*, 337 U.S. 55, 61 (1949): "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

To permit Courts of Appeal jurisdiction in government antitrust cases over appeals from interlocutory orders of the important and controlling kind to which 28 U.S.C. 1292(b) applies would be an enormous service to this Court in lightening its burden and in enlisting the screening agency of intermediate appellate courts. Congress has given the courts a useful tool in § 1292(b). Its aid in government antitrust cases should not be rejected upon an ambiguous history of another statute. The language of 1292(b) supports jurisdiction, and nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it. The question is important, and it cries for resolution.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

DATED, San Francisco, California, September 8, 1971.

MOSES LASKY

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& HEAD

(Appendices Follow)

Appendix A.

United States Court of Appeals
For the Ninth Circuit

Filed Jul 28 1971

TIDEWATER OIL COMPANY, *Defendant and Petitioner,* vs. UNITED STATES OF AMERICA *Plaintiff and Respondent.* and PHILLIPS PETROLEUM COMPANY, *Defendant and Respondents.*	Misc. 5791

Before: CHAMBERS and HAMLEY, Circuit Judges.

The petition for leave to appeal under § 1292(b) is denied. *United States v. Ford Machinery Corporation,* 9 Cir., 321 F.2d 534.

Appendix B

[Names and addresses of counsel omitted]

United States District Court
Central District of California
Civil No. 66-1154-WJF
Filed: Jun 24, 1971

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY and TIDEWATER OIL COMPANY,
Defendants.

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER SECTION 1292(b) OF TITLE 28 OF THE UNITED STATES CODE

The motion of defendant Tidewater Oil Company ("Tidewater") for dismissal upon the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater to defendant Phillips Petroleum Company ("Phillips") has long ago been consummated, that no relief is obtainable against Tidewater, and that its presence in the suit is no longer necessary or appropriate, having duly come on for hearing on June 14, 1971; the Court having heretofore denied plaintiff's application for a temporary restraining order, thus permitting Tidewater's sale of assets to Phillips to be consummated, as found by the Court (Findings 5 and 6 entered November 7, 1966) upon denial of plaintiff's motion for a preliminary injunction,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The motion of Tidewater for dismissal is denied.

2. The Court finds that its order denying defendant Tidewater's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of

opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation. This Court, therefore, certifies its order denying defendant's motion to dismiss for interlocutory appeal under Section 1292 (b) of Title 28 of the United States Code.

Dated: June 24, 1971.

WARREN J. FERGUSON
United States District Judge

[Approvals as to form omitted]

Appendix C

[District Court Caption Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RE MOTION FOR PRELIMINARY INJUNCTION AND ORDER

On July 13, 1966, plaintiff filed its complaint charging that the acquisition by Phillips Petroleum Company (hereafter referred to as "Phillips") of certain assets from Tidewater Oil Company (hereafter referred to as "Tidewater"), under an agreement of March 29, 1966 would violate Section 7 of the Clayton Act. Concurrently with the filing of the complaint, plaintiff filed motions for a temporary restraining order and a preliminary injunction enjoining, *pendente lite,* the closing under the agreement. On July 14, 1966, in circumstances hereafter found, the transaction was closed and consummated. Plaintiff thereafter requested the Court to enter its order rescinding the agreement between Phillips and Tidewater and requiring defendants to take all appropriate action for the complete restoration to Tidewater of the assets pending ultimate resolution of this case on the merits. In the alternative, plaintiff requested the Court to direct Phillips to establish exclusively the Tidewater brand names and trademarks on all retail outlets and other buildings and places from which they have been removed, to operate the acquired assets under the Tidewater brand names and trademarks until final decree, and to take all action necessary to maintain the going concern value of said assets while in Phillips' possession, custody or control. The Plaintiff further prayed that if neither of the foregoing remedies was deemed appropriate by the Court, the Court order Phillips to sell and Tidewater to purchase the assets in question within six months after an ultimate decision on the merits, assuming plaintiff prevails. Plaintiff's motion and requests came on to be heard on August 4 and 5, 1966.

The evidence adduced by the plaintiff consisted of an affidavit of Leonard M. Berke, an economist employed by the Antitrust Division of the United States Department of Justice, together with 39 exhibits. The evidence of defendants in opposition consisted of the sworn testimony of George F. Getty, II, President of Tidewater, given in open Court on July 13 and 14, 1966, and received in evidence on this motion by stipulation, and the affidavits of Stanley Learned, President and Chief Executive Officer of Phillips; George F. Getty, II, President of Tidewater; John E. Roth, Senior Vice President of Tidewater; C. C. Tate, Vice President, Manufacturing, of Phillips; H. R. Tomfohrde, Jr., Group Vice President in charge of Manufacturing, Marketing and Transportation of Tidewater; John Getgood, Vice President, Sales, of Phillips (two affidavits); George E. Glatfelder, Assistant to the Vice President, Sales, of Phillips; Charles D. Signorelli, Controller of Tidewater; Herbert F. Richards, President of California Oil Jobbers Association; Jon R. Katzenbach, a principal of McKinsey & Co., Management Consultants; W. J. Forrester, District Director of District No. 1 of the Oil, Chemical and Atomic Workers International Union AFL-CIO; Tom Coll, Supervisor of Contra Costa County; Moses Lasky, a counsel for Tidewater (two affidavits); and S. E. Floren, Assistant General Attorney of Phillips; and exhibits attached to and part of said affidavits. Having considered all the evidence, together with the oral arguments of the parties and their several written briefs, and having, on August 23, 1966, made and filed herein its "Memorandum Opinion In Re Motion for Preliminary Injunction and Order," the Court upon the record before it and for the purposes of this motion only makes the following:

FINDINGS OF FACT

1. Phillips is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Bartlesville, Oklahoma. Phillips is engaged in the production, manufact-

uring and marketing of petroleum and of petroleum products, including motor gasoline.

2. Tidewater is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Los Angeles, California. Tidewater is engaged in the production, manufacturing and marketing of petroleum and of petroleum products, including motor gasoline.

3. On March 29, 1966, defendant Phillips Petroleum Company and Tidewater Oil Company entered into a Letter Agreement for the sale to Phillips of certain manufacturing, marketing, transportation and related facilities of Tidewater's Western Manufacturing and Marketing Division, including a refinery for the manufacture of refined petroleum products located at Avon, California, and service station properties, all of which were located in California, Washington, Oregon, Nevada, Arizona, Hawaii and Idaho. The Letter Agreement provided for payment by Phillips to Tidewater of the sum of $325,000,000, adjusted in accordance with certain specified provisions of the agreement including provision for payment of the value of inventory on hand at the date of the sale. This agreement did not involve any of the assets or activities of Tidewater's Eastern Division, all of which are located on the eastern seaboard of the United States, or any of Tidewater's assets or activities devoted to exploration or production.

4. On the same day, March 29, 1966, the defendants advised the Department of Justice of the transaction, gave it a copy of the agreement, informed it that the transaction would be consumated June 30, 1966, and thereafter supplied all documents and information requested by the Department of Justice to assist it in considering the competitive effects of the intended acquisition.

5. The Letter Agreement called for the completion of the sale on June 30, 1966, but at the request of the Department of Justice, made on June 28, 1966, the completion of the sale was

postponed until 10 A.M., E.D.T., July 14, 1966, by agreement of Phillips and Tidewater. Not until July 13, 1966, did plaintiff reach a decision to oppose the sale, and it filed its complaint and motion on that date.

6. After filing its complaint herein on July 13, 1966, plaintiff, in the afternoon of that day, applied to the Honorable Charles H. Carr, District Judge, for a temporary restraining order to restrain the consummation of the transaction. Judge Carr, without ordering any restraint upon defendants, directed the plaintiff to apply to the District Judge to whom the suit had been regularly assigned upon its filing, and plaintiff did so on July 14, 1966. Although the application did not come on for hearing before this Court until after the hour scheduled for closing of the transaction on that day, defendants, in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination. In the afternoon of July 14, 1966, this Court denied the requested restraining order, thus permitting the transaction to be closed. * * * Thereafter on July 14, 1966, Tidewater and Phillips closed and consummated the transaction provided for by the agreement of March 29, 1966. Tidewater thereby sold and transferred title and delivered possession to Phillips of all the properties and assets which it had agreed and bound itself to do by said Letter Agreement, and, in so doing, acted pursuant to the obligation of the Letter Agreement.

7. Plaintiff alleges and, for purposes of this motion, the Court assumes that the relevant geographical markets here (the "sections of the country") are California and the "five western states" (defined as "the States of California, Oregon, Washington, Arizona and Nevada").

8. The relevant product market (the "line of commerce") is the sale of motor gasoline.

9. Prior to the sale to Phillips, Tidewater's Western Manufacturing and Marketing Division was engaged in manufacturing motor gasoline and other refined petroleum products at its Avon,

California refinery and was engaged in marketing motor gasoline principally in California, in Hawaii, and in Washington and Oregon west of the Cascade Mountains.

10. Prior to the acquisition, Phillips was not engaged in refining or marketing motor gasoline in California or in Washington and Oregon west of the Cascade Mountains or in Hawaii, and had no refinery anywhere in the five western states.

11. There was no actual competition in the sale of motor gasoline between Phillips and Tidewater in the State of California, and any actual competition existing between Tidewater and Phillips in the five western states was of such a minor nature as to be too economically insignificant to come within the prohibition of the Clayton Act.

12. Plaintiff based its contention that the transaction would violate Section 7 on a theory of potential competition, namely that Phillips, if not permitted to acquire Tidewater's Western Manufacturing and Marketing assets and operations, would nevertheless probably enter into the California market at some time in the future and become an actual and significant competitor there, while at the same time Tidewater would continue to be a competitor there or would sell its assets and operations to purchasers to whom plaintiff would have no objection. To determine whether there is such potential competition involves a forecast of probabilities. The evidence presently before the Court fails to support plaintiff's theory of potential competition, both with respect to Phillips probably becoming a competitior in the California market and Tidewater remaining a competitor therein or someone becoming a competitor therein in Tidewater's place by acquisition from Tidewater.

13. While Phillips is a strong, aggressive company which has expanded its marketing of motor gasoline in the mid-continent and to the southeastern and northeastern parts of the country, Phillips' expansion into those areas has been made possible only by the availability of economic pipeline transportation thereto

from its principal refineries, enabling it to expand its marketing operations from town to town, and county to county, and by the availability of economic water transportation. By means of such transportation, Phillips can meet the competition of mid-continent and eastern refiners throughout those parts of the country. Phillips' market extension in the mid-continent has been based upon and has paralled the development of the mid-continent pipeline complex and river barging on the Mississippi and its tributaries. From one or more of its refineries, Phillips can supply refined products, including motor gasoline, competitively to all parts of the mid-continent region. Phillips' market extension to southern and southeastern coastal states has been possible because of the location of Phillps' Sweeny, Texas refinery (purchased from the United States in 1947) on a deep water channel to the Gulf of Mexico and its access to the Plantation pipeline and, later, the Colonial pipeline. Motor gasoline from Gulf Coast Texas refineries can be laid down in the coastal states and inland in the south and southeast at a cost competitive with east coast refiners. Phillips' market extension to the middle-Atlantic and northeastern states has been made possible by the availability of economic water transportation from Sweeny and by the construction of the Colonial pipeline, which carries refined products along a route from east Texas through the south, southeast and middle-Atlantic states to New York harbor. Phillips can compete with east coast refineries all along the pipeline as well as in the northeast.

14. Market extension into California and into Washington and Oregon west of the Cascades presents a totally different kind of problem to Phillips. Of Phillips' total domestic refining capacity of 289,000 barrels per day, 269,000 barrels are accounted for by refineries located at Borger and Sweeny in Texas, at Okmulgee, Oklahoma, and at Kansas City, Kansas. The balance of 20,000 barrels per day is divided between refineries located at Woods

Cross, Utah (15,500 barrels) and Great Falls, Montana (4,500 barrels). There is no products pipeline by which motor gasoline can be transported from any Phillips refinery to the west coast and no one proposes construction of any such pipeline. Motor gasoline cannot be economically transported to the west coast by water from any Phillips refinery. As a matter of economic practicality, there is no way for Phillips to supply service stations on the west coast with motor gasoline from its existing refineries. The mountains and sparsely settled desert and semi-desert make it economically unfeasible to construct a pipeline from any Phillips refinery to the west coast or for Phillips to extend its marketing operations from town to town, and county to county, to the west coast as it has been able to do in other parts of the United States.

15. As a matter of economic practicality, gasoline not refined on the west coast cannot compete with gasoline refined on the west coast. It is essential that a large marketer have a west coast refinery if it is to market motor gasoline there. Phillips cannot compete in the marketing of motor gasoline on the west coast without a west coast refinery.

16. It would not be economically feasible for Phillips to build a refinery in California or elsewhere on the west coast where, apart from the acquisition from Tidewater, it has no service stations through which the output of such a refinery could be sold. The development of the number of service stations and volume of sales necessary to support a refinery of economic size would be a project entailing many years of effort and loss.

17. Conversely, it would not be economically feasible for Phillips to develop any substantial number of service stations for the marketing of motor gasoline on the west coast without having a refinery to supply such gasoline. Any attempt by Phillips to do so, even assuming it could obtain the necessary supplies of motor gasoline and other refined products from west coast refineries, would result not just in a low rate of return on heavy capital investment, but in continuing losses for the foreseeable future.

18. Any attempt by Phillips to come to the west coast on a unilateral or grass roots basis would be a costly and unprofitable venture for Phillips.

19. Phillips has never had any intention, expectation, program or plan of any kind to attempt by unilateral entry or internal expansion to market motor gasoline in California or in Washington or Oregon west of the Cascades. The only time that Phillips has expanded into any area without the availability to it of pipeline or economic water transportation from its existing refineries was when it entered into eastern Washington and Oregon and the Intermountain area, but this it did by acquisition from others of already established manufacturing and marketing facilities eighteen years ago. Despite having the desire to expand further and enter the west coast market, it has never attempted in those eighteen years to do so by unilateral entry, and it has never indicated any intention to do so other than by an acquisition such as is involved in this case. Phillips' management has not regarded further westward expansion on a unilateral basis as acceptable from an economic point of view.

20. If the transaction between Phillips and Tidewater were prevented, Tidewater would discontinue manufacturing and marketing in California and the west. Tidewater has been losing ground as a marketer of gasoline in the west, and its projections and analyses indicate it will lose further ground in the future.

21. In the ten year period, 1956 through 1965, Tidewater's operations in its Western Manufacturing and Marketing Division resulted in a cash flow deficiency, after capital expenditure requirements, of $93.5 million, and in a net loss. In the five years, 1961 through 1965, the operation of Tidewater's Western Manufacturing and Marketing Division lost Tidewater a net of $12.6 million with losses in four of the five years and with a profit in the other year of but 2.4% on the book investment. A comprehensive study made by Tidewater in 1965 and completed in October

1965 projected and concluded that in 1970 the Western Manufacturing and Marketing Division's net income would only be $1.1 million, which would constitute a return of but 3/10ths of 1% on the investment in manufacturing and marketing. In the same study it was estimated that Tidewater would have to spend as much as $50 million on facilities just to maintain its existing marketing outlets, but that with these existing outlets, maintained at the cost of this additional investment. Tidewater's share of motor gasoline sales in the west would decline by 33⅓%. Tidewater further estimated that any effort to maintain an acceptable share of the market in California would require by 1970 a capital outlay of approximately $190 million for service stations, distribution facilities, and refinery maintenance, and Tidewater further concluded that it was highly problematic whether these expenditures would be effective.

22. Tidewater's share of the gasoline market in the states in which its Western Manufacturing and Marketing Division operated had been steadily dwindling. From 1960 through 1965 it dwindled 31.3% in California, 24.6% in Washington, 25% in Oregon, 29.7% in Nevada and 61.1% in Arizona. The number of service stations owned or leased by it and the number of service stations selling its branded gasolines, other than those owned or leased by it, also declined substantially in California and in the five western state area. Including service stations both owned and leased by Tidewater and stations selling Tidewater's branded products, the declines from 1960 through 1965 were 12.1% in California, 16.1% in the whole of Oregon, 37.4% in Oregon east of the Cascades, 12.6% in the whole of Washington, 18% in Washington east of the Cascades, 14.6% in Nevada, and 57.1% in Arizona. During the same period the motor gasoline sales of Tidewater's Western Manufacturing and Marketing Division declined not only relatively but in absolute gallonage despite large population increases in the western states which resulted in a sharp increase in total gallonage consumed.

23. Conversely, Tidewater has been successful in the production of crude oil, and by far the greatest percentage of its profit has been derived from such production. In this connection, Tidewater has been one of the pioneers and leaders in secondary recovery methods, that is, the recovery of crude oil by methods other than the natural energy mechanism of the reservoir. Primarily as a result of its success with secondary recovery techniques, estimates of Tidewater's net recoverable crude oil reserves in California have risen from 228,000,000 barrels in 1963 to 796,000,000 barrels in 1965. This program, however, is costly, and it is estimated that additional capital outlays of $74,416,000 will be required for this program between now and the end of 1970 and that over the next ten years capital requirements will exceed $112,000,000. In 1965, although only one-third of Tidewater's assets were invested in domestic exploration and production, that one-third accounted for $63.97 million of net income, whereas all of Tidewater's other operations as a whole produced in the aggregate losses and reduced the total net income to $56.5 million. In the first half of 1966, domestic exploration and production generated $33.7 million of net income out of total net income of $37.4 million. Each dollar invested by Tidewater in domestic exploration and production produced 8 times as much income as each dollar invested in its Western Manufacturing and Marketing operations. It was Tidewater's judgment that it would rather devote its resources to these operations of exploration and production than to any effort of trying to protect and improve its declining and ailing position as a refiner and marketer. Tidewater had no disposition to invest the great amount of capital required even to maintain its status quo as a West Coast marketer. Its management, confronted with the choice of making large additional investments in manufacturing and marketing in the West, or, in the alternative, concentrating its energies and resources on exploration and production, came to the fixed conclusion that it would

leave the field of refining and marketing in the West and become solely a producer.

24. To that end Tidewater was resolved to break up and junk the refinery at Avon, if necessary. Tidewater could sell off its service station sites as real estate either at a profit over their value as service stations or at no loss in view of the burgeoning population in the West Coast States, particularly California. While Tidewater would doubtless realize less than its investment for its refinery, if broken up, Tidewater was convinced that it could invest the proceeds elsewhere at so vastly a greater rate of return as to make this course highly desirable. Thus, if the acquisition by Phillips were prevented, Tidewater's Western Marketing and Manufacturing Division would have had good reason to cease marketing and manufacturing, by one way or another, and it set a goal of one year in which to do so.

25. Tidewater has been unable to find any desirous of purchasing its Western Manufacturing and Marketing assets as a whole and able to do so. It has tried without success to enlist other buyers, including British Petroleum Company, Ltd., Gulf Oil, Standard Oil Company (Indiana), American Petrofina, Inc., Shaheen Natural Resources Company, Inc., and a French company. The efforts of Humble Oil and Refining Company to buy such assets in 1963 were blocked by a government antitrust action.

26. Phillips' acquisition will not adversely affect the supply of gasoline to the independent marketer. If Tidewater breaks up the Avon refinery, as the Court finds it would do, that refinery would cease to be a source of supply for independent marketers. On the other hand, under Phillips' ownership, the refinery will continue to be a source of supply for independents. Phillips will continue to supply them under existing supply contracts assumed from Tidewater, it has no intention of refusing to renew such contracts, and it will seek the business of independent marketers in the west as it does elsewhere. It has been Phillips' practice for

many years to supply products from its refineries to independent marketers. Phillips plans to enlarge the capacity of the Avon refinery, thus increasing its total supply of motor gasoline available for sale. Herbert F. Richards, President of the California Oil Jobbers Association, testified that the independent oil jobbers on the west coast believe, and the Court finds, that the substitution of Phillips for Tidewater will increase supplies of gasoline for independents and will increase competition in the oil industry.

27. Many third parties not before the Court were involved in the sale transaction. As a part of the completion of the sale, Phillips committed itself to issue notes in the aggregate principal amount of $200,000,000 due on July 1, 1991, and thirty-five lenders committed themselves to buy such notes. As a further part of the completion of the sale, Phillips assumed obligations of hundreds of leases on service station sites which had theretofore been leased by Tidewater, individual consents having been negotiated and obtained from each landlord for the substitution of Phillips for Tidewater as lessee. There were more than 1000 cases of transfer of property or contract interests from Tidewater to Phillips in which executed written consents were necessarily obtained from interested individuals, corporations and governmental agencies. Phillips assumed indebtedness of Tidewater and its subsidiaries and affiliates in the total amount of $39,060,064.18, significantly altering the rights of the creditors involved. Tidewater's agreements with labor unions were renegotiated to bring employees covered by those agreements under Phillips' welfare and pension plans and other changes were effected in the bargaining agreements. The conditions of employment of many Tidewater personnel not members of any collective bargaining unit were also altered. The rights of these third parties who are not before the Court would be seriously affected by the granting of any relief which would set aside the sale.

28. Since the closing of the transaction Phillips has either spent or contracted to spend several million dollars in the development of the marketing phases of its business on the West Coast resulting from the acquisition.

29. If the sale to Phillips were undone, with the consequent closing of the Avon refinery and discontinuance of Tidewater's Western Manufacturing and Marketing operations, as found above, incalculable and irreparable harm would be inflicted upon Tidewater's thousands of employees by loss of employment, upon its dealers by loss of livelihood, upon the County of Contra Costa and the City of Concord by loss of payroll and tax revenues, and upon the Mount Diablo Unified School District by loss of tax revenues.

30. Undoing the transaction before trial on the merits might prevent the acquisition from ever being consummated even if it should be found to be valid and permissible under Section 7, (a) because economic and market conditions at that time might well be such as to make the acquisition by Phillips impossible or (b) because of the probability that in the interim prior to trial Tidewater would lose dealers and important personnel and its assets would become so diminished in value to Phillips as to make the transaction undesirable from Phillips' standpoint.

31. There is no reasonable probability that absent the acquisition Phillips would enter into the west coast area by unilateral or "grass roots" development. The probabilities are that if Phillips were not permitted to acquire and keep Tidewater's Western Manufacturing and Marketing assets and operations, it would not at any time in the foreseeable future enter into or become a competitor in that area.

32. There is no reasonable probability that Tidewater would remain a manufacturer or marketer in the west if the sale to Phillips were prevented or undone. If the transaction with Phillips were to fail, Tidewater's Western Manufacturing and

Marketing Division would cease to exist in the near future, and Tidewater would vanish as a competitive entity in the western states, and the operations and assets themselves would vanish as a competitive entity.

33. There is no reasonable probability that the acquisition by Phillips will lessen competition or tend to create a monopoly in any line of commerce in any section of the country. On the contrary, Phillips will be a strong competitor and it is probable that the acquisition will promote competition in motor gasoline in California and in the five western states.

34. There is no reasonable probability that the plaintiff will prevail on the merits in a trial of this case.

35. The following conclusions of law, insofar as they may be considered findings of fact, are found by this Court to be true in all respects.

From the foregoing findings of fact the Court makes the following:

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing findings of fact.

2. This Court has jurisdiction to prevent and restrain violations of Section 7 of the Clayton Act, and therefore has jurisdiction to act upon plaintiff's motion.

3. The motion for preliminary injunction should be and is hereby denied.

4. Without reaching the question whether the Court has power to order rescission of the agreement or to require Tidewater to reacquire the assets from Phillips, the facts as found would not support exercise of such a power even if it existed. Therefore plaintiff's request that the Court order a rescission of the agreement of March 29, 1966, or a restoration to Tidewater of the assets pending ultimate resolution of the case on the merits should be and is denied.

5. Plaintiff's alternative prayer that Phillips operate under the Tidewater brand names and trademarks and establish exclusively the Tidewater brand names and trademarks on all retail outlets and other buildings and places from which they have been removed and to take all action necessary to maintain the going-concern values of said assets while in the possession, custody or control of Phillips must likewise be and is denied.

6. Plaintiff's request that this Court now declare what kind of relief it will direct if plaintiff should eventually prevail upon the merits after a full trial should be and is hereby denied.

ORDER DENYING PRELIMINARY INJUNCTION

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed that plaintiff's motion for a preliminary injunction filed July 13, 1966 and all other requests by plaintiff for a preliminary relief be and the same are hereby denied.

Dated: November 1, 1966.

FRANCIS C. WHELAN
United States District Judge

[Acknowledgment of service omitted]

Appendix D

[District Court Caption Omitted]

Civil No. 66-1154-WJF

NOTICE OF MOTION BY TIDEWATER OIL COMPANY FOR DISMISSAL

To Plaintiff, to Defendant Phillips Petroleum Company, and to Their Respective Counsel of Record:

PLEASE TAKE NOTICE, hereby given, that on Monday, April 26, 1971, at 10 o'clock in the morning, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable William J. Ferguson, United States District Judge, United States Courthouse, 312 North Spring Street, Los Angeles, California, defendant Tidewater Oil Company will move for dismissal, on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seiler, that the sale of assets by defendant Tidewater Oil Company to Phillps Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Compony, and that its presence in the suit is no longer necessary or appropriate. The motion will be based on all papers on file herein, the attached Affidavit of R. D. Copley, and the accompanying memorandum.

Dated: April 8, 1971.

MOSES LASKY
BROBECK, PHLEGER & HARRISON
C. LANSING HAYS, JR.
HECHT, HADFIELD, HAYS,
LANDSMAN & HEAD
R. D. COPLEY, JR.

By /s/ MOSES LASKY
Attorneys for Defendant
Tidewater Oil Company.

[Affidavits Omitted]

Appendix E.

United States District Court
Central District of California

Honorable Warren J. Ferguson, Judge Presiding

No. 66-1154-F

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PHILLIPS PETROLEUM CO., et. al.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, June 14, 1971
Pages: 1 through 25

* * *

[Tr. 4]

The Court: Mr. Murphy.

The Clerk: No. 15 on the calendar, case No. 66-1154-F, United States of America versus Phillips Petroleum Company, et al., hearing Defendant Tidewater's motion to dismiss and for preliminary pretrial conference.

Would you state your appearances, please.

Mr. Lasky: Moses Lasky for the defendant Tidewater the moving party.

* * *

[Tr. 5]

The Court: Let's get the other appearances, shall we, first.

Mr. Duvall: Melvin J. Duvall and William S. Farmer for the United States.

Mr. Clary: If your Honor please, Everett B. Clary, William Peel [iel] and John Dickey for the Defendant Phillips Petroleum.

* * *

[Tr. 23]

The Court: I am going to deny the motion, Mr. Lasky. I feel that there is sufficient authority in the law and sufficient power in the court to keep Tidewater as a defendant, a party defendant.

However, I do recognize that the course of the trial will depend upon the correctness of my ruling.

And therefore I will issue an order making my ruling appealable.

Mr. Lasky: Then we will take a prompt interlocutory appeal.

The Court: Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit.

Mr. Lasky: We will take a prompt interlocutory appeal with your Honor's permission.

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No. 71-366

In the Supreme Court of the United States

OCTOBER TERM, 1971

TIDEWATER OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND PHILLIPS PETROLEUM COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RICHARD W. McLAREN,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The order and certification of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1971. The petition for a writ of certiorari was filed on September 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Technically, Section 1254(1) appears inapplicable here. Because leave to appeal was denied below, this case was never "in

446-421—71

QUESTION PRESENTED

Whether the Expediting Act precludes a court of appeals in a civil antitrust action brought by the United States from entertaining an interlocutory appeal certified pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b).

STATUTE INVOLVED

Section 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. 29, provides:

> In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

The Interlocutory Appeals Act, 62 Stat. 929, as amended in 1958, 72 Stat. 1770, 28 U.S.C. 1292(b), provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for

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the court of appeals" within the meaning of Section 1254. See *House* v. *Mayo*, 324 U.S. 42, 44 (*per curiam*), construing the predecessor of 28 U.S.C. 1254(1); 7B, Moore, *Federal Practice*, Section 1254 (2d ed., 1970). The Court, however, may issue a common law writ of certiorari under the All Writs Statute, 28 U.S.C. 1651(a). *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 201–203; *In the Matter of 620 Church Street Building Corp.*, 299 U.S. 24, 26.

> difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT

In July 1966, the United States filed a civil antitrust suit alleging that the acquisition by Phillips Petroleum Company ("Phillips") of certain assets and operations of petitioner Tidewater Oil Company ("Tidewater") violated Section 7 of the Clayton Act, 15 U.S.C. 18. At the same time, the government filed motions for a temporary restraining order and a preliminary injunction to enjoin consummation of the acquisition. The next day, the district court denied a temporary restraining order and Tidewater transferred title to its Western Marketing and Manufacturing Division to Phillips (Pet. App. C, pp. 4–7). In November 1966, the district court denied the motion for a preliminary injunction, which sought either rescission of the transaction or maintenance by Phillips of the going concern value of the transferred assets and operations (Pet. App. C).

Tidewater continued as a party during the ensuing five years of pretrial discovery and preparation.[2] In April 1971, following the government's announcement that it had completed discovery and was prepared for trial, Tidewater moved for its dismissal as a party (Pet. App. D). The district court denied the motion (Pet. App. B), but included in its order a certification for interlocutory appeal.

The Court of Appeals for the Ninth Circuit denied *per curiam* Tidewater's petition for leave to appeal under Section 1292(b), relying upon its earlier decision in *United States* v. *FMC Corporation,* 321 F. 2d 534 (C.A. 9).

ARGUMENT

1. This Court refused to review the question raised here—the jurisdiction of a court of appeals to consider an interlocutory appeal under 28 U.S.C. 1292(b) in a government civil antitrust suit—in the 1968 Term. In *Farbenfabriken Bayer, A.G.* v. *United States,* 1968 Trade Cases ¶ 72,570 (C.A.D.C.), certiorari denied, 393 U.S. 959, petitioner Bayer moved in the district court for dismissal of a civil antitrust suit brought against it by the government. As here, the district court denied the motion but certified the question for interlocutory appeal pursuant to Section 1292(b).[3] The court of appeals, however, de-

[2] Tidewater merged with the Getty Oil Company on September 30, 1967. Tidewater has never contended that that merger altered Tidewater's legal status as a party defendant in the present case.

[3] See *United States* v. *Farbenfabriken Bayer, A.G. and Chemagro Corp.*, 1968 Trade Cases ¶ 72,569 (D.D.C.), decided May 14, 1968.

nied the resultant application for an interlocutory appeal.

Bayer then petitioned this Court for a writ of certiorari,[4] asserting, as does Tidewater here, that the Expediting Act was not intended and does not operate to preclude interlocutory appeals certified under Section 1292(b). See Petition for a Writ of Certiorari, No. 505, October Term, 1968. This Court denied certiorari. 393 U.S. 959.

The same reasons that resulted in the denial of certiorari in *Bayer* apply here, and call for the same result.

2. The decision below is correct. This Court has consistently ruled that Section 2 of the Expediting Act precludes interlocutory appeals in government civil antitrust cases, since it permits appeals in such cases to be taken only from "final judgments" of the district court. As Mr. Justice Brandeis explained in the first decision announcing the rule, *United States* v. *California Cooperative Canneries,* 279 U.S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an

[4] Concurrently, Bayer filed a jurisdictional statement (No. 504, October Term, 1968) and various motions for leave to file petitions for writs of certiorari pursuant to the All Writs Statute, 28 U.S.C. 1651 (838 Misc. and 839 Misc., October Term, 1968). Bayer's appeal was ultimately dismissed, 393 U.S. 216, and its motions denied, 393 U.S. 958.

> appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree. * * *

See also, *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142; *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 201–202; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217; *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 304–305. Cf. *United States* v. *FMC Corporation*, 84 S. Ct. 4, 5–7 (Mr. Justice Goldberg, in chambers).[5]

The congressional purpose of the Expediting Act is to facilitate review by this Court of civil antitrust suits brought by the United States, which were deemed by Congress to be of "great and general importance." 36 Cong. Rec. 1679 (remarks of Senator Fairbanks). Congress believed that "the delays inherent in allowing interlocutory appeals and review in two appellate courts" could be eliminated by limiting review to direct appeals from final judgments of the trial court. *United States* v. *FMC Corporation, supra*, 84 S. Ct. at 6. To permit interlocutory review in the courts of appeals would "impinge upon both aspects of the Expediting Act: the final review jurisdiction of the Supreme Court and expedition to the Supreme Court".

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[5] On September 30, 1971, the Seventh Circuit in *Fison Limited* v. *Hon. Joseph Sam Perry*, 69 C 1530, set down for oral argument the question whether Section 1292(b) is applicable to government antitrust cases.

United States v. *Cities Service Company*, 410 F. 2d 662, 664 (C.A. 1).[6]

3. Petitioner asserts that the language of Section 1292(b) gives the courts of appeals jurisdiction to review interlocutory orders in government civil antitrust cases, and that "nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it" (Pet. 21). Petitioner does not dispute, however, that since *United States* v. *California Cooperative Canneries*, *supra*, this Court consistently has interpreted the Expediting Act as limiting appeal to final judgments. While the language of Section 1292(b) is silent on the question of interlocutory appeals in government civil antitrust cases, there is no indication in the statute's legislative history that Congress intended a partial repeal, *sub silencio*, of the Expediting Act's long recognized prohibition against interlocutory appeals.[7] Indeed, in 1962, four years after passage of

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[6] In recent years the United States has argued in the courts of appeals that Congress intended to preserve a single exception to the policy against interlocutory appeals in government civil antitrust cases, in favor of a right of appeal from the grant or denial of an interlocutory injunction. This claim, based primarily on the legislative history of the predecessor statute to the present 28 U.S.C. 1292(a)(1), generally has been rejected. See *United States* v. *Cities Service Co.*, 410 F.2d 662 (C.A. 1); *United States* v. *FMC Corp.*, 321 F.2d 534 (C.A. 9); but see *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509 (C.A. 3). In any event, there is no comparable basis for an argument in favor of interlocutory appeal to the courts of appeals from any other kind of order.

[7] The Senate Report on the legislation does indicate that Section 1292(b) was intended to apply to "antitrust cases" in

Section 1292(b), the Court reaffirmed the principle that the Expediting Act was intended to limit review in a civil antitrust suit brought by the government "to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Brown Shoe Co., Inc.* v. *United States*, *supra*, 370 U.S. at 305, n. 9.[8]

Finally, petitioner argues that permitting interlocutory appeals in government civil antitrust cases would be "an enormous service to this Court in lightening its burden * * *" (Pet. 21). But even if this is so, it would not justify ignoring the limitation in the Expediting Act, which permits appeals only from final judgments and only to this Court. It would be anomalous for a court which is without jurisdiction to entertain an appeal from the final judgment to rule on a "controlling question of law"—the standard in the Interlocutory Appeals Act—which could control the outcome of the case. In view of the possible multiple appeals such a procedure would foster, the interlocutory review that petitioner seeks, far from expediting government civil antitrust cases, would only occasion delay and uncertainty in litigation. Even if such a marked and far-reaching modification of the

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at least one instance. S. Rep. No. 2434, 85th Cong., 2d Sess. 3. In context, however, the intended reference is to *private* antitrust suits, not subject to the Expediting Act.

[8] While petitioner correctly notes that the question of interlocutory appeal under Section 1292(b) was not before the Court in *Brown Shoe* (Pet. 19), the Court was fully aware of that section in making the quoted statement. See 370 U.S. at 306, n. 12.

Expediting Act is supportable on policy grounds, the modification can be made only by Congress. *United States* v. *Cities Service Company*, 410 F. 2d 662, 667–668 (C.A. 1).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfuly submitted.

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OCTOBER 1971.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The brief of the United States in opposition does not controvert—indeed, appears to concede—that to permit interlocutory appeals in a government civil antitrust case under 28 U.S.C. § 1292(b) would be "an enormous service to this Court in lightening its burden" (p. 8). It argues, however, that this "would not

justify ignoring the limitation in the Expediting Act". That statement reverses the correct question, which is whether the Expediting Act, enacted in 1903, should be interpreted to read into the Interlocutory Appeals Act, enacted in 1958, a limitation which is not there but which is sought to be derived from the entirely different history of § 1292(a). That question deserves the attention of this Court.

Our petition called attention to *Farbenfabriken Bayer, A.G.* v. *United States,* 1968 Trade Cases ¶ 72,570 (C.A.D.C.) (Pet., p. 20). The brief in opposition informs us that certiorari was denied in that case in 1968. That is a fact to which the government had not called attention when it cited the case below, and there was no available means of tracing its history, as the case had not been officially reported. We submit that no significance should be given to denial of certiorari in the *Farbenfabriken* case, particularly in view of the way in which the matter came before this Court. There the District Court had denied a motion to dismiss a complaint for insufficient service of process under the Patent Code. Defendant made four simultaneous but different efforts to have this Court hear its cause. On the same day in October Term, 1968 (September 11, 1968), it filed a 19-page jurisdictional statement supporting an appeal directly from the District Court (No. 504), a 20-page motion for leave to file a petition for a common law writ of certiorari directly to the District Court (Misc. No. 838), an 11-page motion for leave to file a petition for a common law writ of certiorari to the Court of Appeals (Misc. 839), and a 9-page petition for a writ of certiorari to that court (No. 505). The greater part of this extensive material dealt with the merits of the motion in the District

Court; the appeal was dismissed and the motion and petitions denied on the same day (393 U.S. 216, 958, 959).

It is by the present petition that the basic question is squarely presented for the first time to this Court, unencumbered by extraneous considerations, and at a time when continuing history and the pressure of litigation on this Court emphasizes the importance of the question and the necessity that it be authoritatively resolved. The brief in opposition discloses (p. 6) that even now the issue is before the Seventh Circuit.

In a footnote (p. 1) the brief in opposition throws out a passing suggestion that "technically" a petition for certiorari under 28 U.S.C. § 1254(1) "appears inapplicable" on the theory that the "case was never in the Court of Appeals" because leave to appeal to that court was denied. Although the brief in opposition then dismisses the objection as of no moment, because this Court may issue a common law writ, we note that the objection lacks merit, even technical. While the case of *United States* v. *Phillips Petroleum Company and Tidewater Oil Company* may never have been in the Court of Appeals, the case of *Tidewater Oil Company* v. *United States of America and Phillips Petroleum Company,* No. Misc. 5791 in United States Court of Appeals for the 9th Circuit, *was* in that court. The petition for leave to appeal was a separate and independent proceeding filed in the Court of Appeals under 28 U.S.C. § 1292(b), and it is the disposition of that proceeding of which we seek review by the instant petition for certiorari.

All other arguments in the brief in opposition were anticipated and covered in our petition.

CONCLUSION

We respectfully submit that the petition should be granted.

DATED: October 19, 1971.

MOSES LASKY
C. LANSING HAYS, JR.
Attorneys for Petitioner

Of Counsel:

BROBECK, PHLEGER & HARRISON
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In the Supreme Court of the United States

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OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Motion for Leave to File Out-of-Time Petition for Rehearing and Petition for Rehearing of Order on Petition for a Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Motion for Leave to File Out-of-Time Petition for Rehearing

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on November 9, 1971. No timely petition for rehearing was filed inasmuch as no grounds for such a petition then existed. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition for rehearing, a decision of the Court of Appeals for the Seventh Circuit was rendered on January 5, 1972, in Misc. No. 1235, *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America,* which is in direct conflict with that rendered by the Ninth Circuit in the instant case. A copy of that opinion appears in the appendix to the attached petition.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose afterwards. This Court clearly has power, in its discretion and in the interests of justice, to entertain the petition in these circumstances. See *United States v. Ohio Power Co.*, 353 U.S. 98; *Gondeck v. Pan American World Airways*, 370 U.S. 918.

January 19, 1972.

Respectfully submitted,

MOSES LASKY

C. LANSING HAYS, JR.

Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Petition for Rehearing of Order on Petition for a Writ of Certiorari

The petitioner respectfully petitions this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 9, 1971, and (2) granting the petition for certiorari, on the grounds stated below.

The question presented is this:

> In a civil action brought in a district court by the United States under Section 7 of the Clayton Act (15 U.S.C. § 18), does a Court of Appeals have jurisdiction to entertain a petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the district court which certifies that it involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation?

The court below answered that question in the negative. The identical question was presented to the Seventh Circuit in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America,* Misc. No. 1235, and answered in the affirmative by its decision of January 5, 1972. The Seventh Circuit stated that it was aware of the Ninth Circuit's decision in the present case and noted that this Court had denied certiorari. It stated that it had considered "with care" the arguments accepted by the Ninth Circuit but rejected them. A copy of the opinion of the Seventh Circuit is found at Appendix A hereto.

The Seventh Circuit's decision confirms our contention that the question is an important one and cries for resolution by this Court. Conflict on that question between the circuits is of more than a routine matter. If there is any kind of case in which the rights of litigants must not be different in the circuits, it is the government antitrust case.

The first and commonest type of case of intervening or new circumstances warranting a rehearing under Rule 58(2) is that of a new and conflicting decision by another Court of Appeals. *Sanitary Refrigerator Co. v. Winters,* 280 U.S. 30, 34n; *United States v. Ohio Power Co.,* 353 U.S. 98. This is such a case.

CONCLUSION

It is respectfully submitted that the motion for leave to file the petition for rehearing and the petition for rehearing should be granted, that the Court's order of November 9, 1971 should be vacated, and that the petition for a writ of certiorari should be granted.

January 19, 1972

Respectfully submitted,

MOSES LASKY

C. LANSING HAYS, JR.

Attorneys for Petitioner

Of Counsel:

BROBECK, PHLEGER & HARRISON

HECHT, HADFIELD, HAYS, LANDSMAN & HEAD

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2), as a result of intervening circumstances of substantial or controlling effect, to wit, the rendering of a decision by the United States Court of Appeals for the Seventh Circuit on January 5, 1972, in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America,* No. Misc. 1235, which is in direct conflict with the decision of the court below in this case.

MOSES LASKY

Counsel for Petitioner

(Appendix Follows)

Appendix

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

Misc. No. 1235

FISON LIMITED AND FISONS PHARMACEUTICALS LTD.,
Petitioners-Defendants,

v.

UNITED STATES OF AMERICA,
Respondent-Plaintiff

Petition For Appeal Under § 1292(b)
From the United States District Court
for the Northern District of Illinois.

No. 69 C 1530

HON. J. SAM PERRY, *Judge.*

January 5, 1972

Before PELL, STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.* Three jurisdictional issues are presented by this appeal: (1) whether an interlocutory order in a civil antitrust case brought by the United States may be reviewed by a court of appeals pursuant to 28 U.S.C. § 1292(b); (2) if so, whether this is an appropriate case for the exercise of that jurisdiction; and (3) if that also be so, whether the district court acquired personal jurisdiction over petitioners as a result of service effected pursuant to § 17(1)(a) of the Illinois Civil Practice Act. We answer all three questions in the affirmative.

Petitioners are two British corporations, one the wholly owned subsidiary of the other, each having its principal place of busi-

ness in England. They manufacture iron dextran in Great Britain and sell it to certain large American companies. Iron dextran is a patented product used in the treatment of anemia and other iron deficiency conditions in humans and other animals. Petitioners own the American patent on iron dextran and have entered into license agreements which the Government claims are violative of the Sherman Act.

This litigation was commenced on July 23, 1969, when the Government filed its complaint pursuant to § 4 of the Sherman Act, 15 U.S.C. § 4, against five defendants, including the two petitioners and their three American licensees. It is alleged that trade in iron dextran has been unreasonably restrained since 1956 by the defendants' license agreements which allocate markets, restrict the resale of the product in bulk form, control the use of certain trademarks, require the licensees to assign all trademarks to petitioners when the agreements expire, and restrict the grant of additional licenses.

The jurisdictional requirement of § 17(1)(a) of the Illinois Civil Practice Act was allegedly satisfied by (1) the existence of the agreements, which affect the economy of Illinois; (2) the fact that all three licensees do business in Illinois; (3) the continual exportation of iron dextran from Britain for resale in Illinois; and (4) the fact that certain business relating to the agreements was transacted in Illinois by officers of petitioners and a predecessor in interest.

On August 21, 1969, petitioners filed a motion to quash service and to dismiss the complaint against them for lack of jurisdiction. The motion was supported by an affidavit in which the conclusory allegations in the complaint were denied, and except for three visits in 1968 and two in 1969, all direct contact between petitioners and the transaction of business in Illinois was specifically denied. The Government conducted extensive discovery on the jurisdiction issue, the matter was briefed exensively, and ultimately the district court overruled the motion to quash or to dismiss.

In his order entered on August 27, 1971, the district judge expressed the opinion that he had decided "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation." He then stated the controlling question[1] and ordered that further proceedings involving the two petitioners be stayed "until a final decision on any interlocutory appeal under 28 USC § 1292(b)."

Within the 10-day period specified in the statute petitioners sought permission from this court to take an appeal from that order.[2] The Government opposed the petition, contending that § 1292(b) is not applicable to cases which are subject to the Expediting Act of 1903, 15 U.S.C. § 29, and in any event, since the decision of the district court was correct, there was no reason to allow a discretionary appeal.

On September 30, 1971, after noting the importance and novelty in this court of the question presented under § 1292(b), we set the matter for oral argument, invited the parties to file additional memoranda, and directed that the district court proceed-

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1. "The controlling question of law presented is whether as of July 23, 1969, either British defendant Fisons Limited or Fisons Pharmaceuticals Ltd. was transacting business in Illinois sufficient to permit service under the long-arm statute § 17(1)(a) of the Illinois Civil Practice Act, where the only contact of these defendants with Illinois is as follows: (a) defendants are parties to a patent license agreement with a licensee found in Illinois, the agreement having been executed outside of Illinois; (b) defendants make and sell patented products to such patent licensee in England where title passes; and (c) defendants' officers have visited Illinois to discuss with such licensee said agreement and possible future agreements, and to discuss with counsel in Illinois matters concerning a patent infringement suit filed in the Third Circuit."

2. By separate petition they also prayed for a writ of mandamus or prohibition. Because such relief in this court is only appropriate "in aid of" our own jurisdiction, see *United States Alkali Association v. United States*, 325 U.S. 196, 202; *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 25, we held that it could not be granted unless we had jurisdiction pursuant to § 1292(b), in which event the extraordinary relief would be unnecessary. We therefore denied the petition for a writ of mandamus or prohibition.

ings not be stayed while the issues were under consideration here.

We now explain why we believe each jurisdictional question should be answered affirmatively.

I.

The two statutes directly relevant to the first jurisdictional issue were enacted, respectively, in 1903 and 1958. The earlier is commonly known as the Expediting Act,[3] and the latter as the Interlocutory Appeals Act.

The Expediting Act applied to suits in equity brought under the Sherman Act, the Interstate Commerce Act, or any other act "having a like purpose" that might thereafter be enacted. Its first section authorized the Attorney General to file a certificate of importance in such cases, whereupon the matter would be heard by three judges and given precedence over other litigation "and in every way expedited." That procedure, though still authorized by 15 U.S.C. § 28, was not used in this case and has been employed rarely, if at all, in recent years.[4]

Section 2 of the Expediting Act drastically shortened the time for appeal in cases covered by the statute. Prior to its enactment in 1903, six months were allowed in which to take an appeal to the Circuit Court of Appeals, 26 Stat. 826, 829, and one year after the entry of that court's judgment, an appeal lay to the Supreme Court. 26 Stat. at 828. Section 2 provided:

> "That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final

3. Its actual title was: "An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted." 32 Stat. 823.

4. See Proposed Amendment to Expediting Act Would Eliminate Direct Appeal to Supreme Court, 39 N.Y.U.L. Rev., 319, 32 n.40 (1964).

decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. . . ."[5] 32 Stat. 823; 15 U.S.C. § 29.

By its terms, § 2 of the Expediting Act applies to appeals from final decrees in a limited category of cases. The Interlocutory Appeals Act of 1958 makes no reference to final orders and its language is applicable to all civil litigation in the federal district courts. It provides:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 1292 of title 28 of the United States Code is hereby amended by insertion of the letter (a) at the beginning of the section and adding at the end thereof an additional subparagraph lettered (b) to read as follows:
>
> "'(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.'
>
> "Approved September 2, 1958." 72 Stat. 1770.

A plain reading of the two statutes reveals no inconsistency between them. If they had been enacted simultaneously, the language of each could be given full effect without limiting the scope of the other. If some conflict in literal meaning did exist, under normal rules of construction the later statute would pre-

5. The section also included a proviso relating to appeals taken before the effective date of the statute.

vail. *United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 912 (7th Cir. 1942); *Eisenberg v. Corning*, 179 F.2d 275, 276 (D.C. Cir. 1949).

The purpose of the 1958 Act is consistent with the expediting purpose of the 1903 Act. Although it authorizes a departure from the general practice of postponing appellate review until after the entry of a final judgment, such authorization is only for the purpose of materially advancing the ultimate termination of the litigation. The specified procedure must be invoked within ten days and shall not stay proceedings in the trial court unless a judge shall expressly so direct.

The legislative history of the Interlocutory Appeals Act indicates that it was intended to apply to protracted cases, including antitrust litigation.[6] Indeed, it is fair to infer that its primary efficacy was expected to occur in cases of exceptional magnitude.[7]

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6. We recognize that the examples of antitrust litigation referred to in the Senate Committee Report were apparently private cases and that no unambiguous reference to Government litigation appears. The many federal judges who participated in the consideration of the proposed legislation, however, were certainly familiar with appellate procedure in both private and Government antitrust litigation, whether civil or criminal.

7. Thus, a letter from the Administrative Office of the U.S. Courts appended to the Senate Committee Report stated that the interlocutory appeal procedure "will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases, ..." S. Rep. 2434 (85th Cong. 2d Sess.) 1958 U.S. Code Cong. & Adm. News 5255, 5259.

The report itself contained language, which, with only slight changes, might have been written of the very case before us:

> "For example, in a recent case a motion to dismiss for want of jurisdiction was filed in the district court early in the proceedings. The district court denied the motion and the matter then proceeded to trial. The disposition of that case took almost 8 months. Upon final order the case was appealed and the court of appeals determined that the district court did not have jurisdiction and entered an order accordingly. Had this legislation been in effect at that time, the district judge could have stated in writing his opinion that the motion was controlling and the defendant could thereupon have made application to the court of appeals for a review of the order denying the motion." 1958 U.S. Code Cong. & Adm. News at 2556.

In sum, the plain language, the purpose, and the history of the Interlocutory Appeals Act of 1958 are all consistent with its application to civil antitrust litigation commenced by the United States.

The Government advances a number of arguments for a contrary interpretation. None of these arguments questions the wisdom of applying the 1958 Act to this type of case, or suggests any conflict between the language or the policy of the two statutes. In essence, it is the Government's position that the Expediting Act is an especially important statute which has been construed to mean a great deal more than it says, and specifically to foreclose interlocutory appeals; nothing short of an express amendment of that statute, it is argued, should be permitted to modify that construction. Since other circuits have accepted these arguments,[8] we have considered them with care.

First, we note that the Expediting Act is just another statute. It has been on the books a long time and it deals with important litigation. But the statute itself commands no special respect today. It has been criticized by Supreme Court Justices[9] and other scholars,[10] and narrowly construed to permit a court of appeals

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8. *Farbenfabriken Bayer A. G. v. United States,* 1968 Trade Cases ¶ 72,570 (D.C. Cir.), *cert. denied* 393 U.S. 959; *Tidewater Oil Co. v. United States,* Misc. No. 9751 (9th Cir. July 28, 1971), *cert. denied* 40 U.S.L.W. 3212.

9. "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. See, *e.g.,* Gesell, A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases, in 1961 N.Y. State Bar Assn. Antitrust L. Sym. 98 (CCH). Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." *United States v. Singer Mfg. Co.,* 374 U.S. 174, 175 n.1.

See also *Brown Shoe Co. v. United States,* 370 U.S. 294, 355 (Mr. Justice Clark concurring); 370 U.S. at 364-365 (Mr. Justice Harlan dissenting in part).

10. See Comment, Direct Appeals in Antitrust Cases, 81 Harv. L. Rev. 1558 (1968); Comment, Proposed Amendment to Expediting Act Would Eliminate Direct Appeal to the Supreme Court, 39 N.Y.U.L. Rev. 319 (1964).

to participate in appellate review of at least one civil antitrust case in which the Government was a party.[11] We do not consider our appraisal of the question presented here as an intrusion on hallowed ground.

Second, we note the significant difference between this question and the issues raised by attempts to appeal from orders granting or denying preliminary injunctions pursuant to § 1292(a) of the Judicial Code. That section has a dramatically different history, as well as a significant difference in its language, from § 1292(b). That long history was thoughtfully and thoroughly reviewed by the First Circuit in *United States v. Cities Service Co.*, 410 F.2d 662 (1969), and by the Third Circuit in *United States v. Ingersoll Rand Co.*, 320 F.2d 509 (1963); see also the opinion of Mr. Justice Goldberg in chambers in *United States v. F.M.C. Corp.*, 84 Sup. Ct. 4 (1963).

It is sufficient to note that the enactment of the Expediting Act in 1903 was a chapter in that history which had commenced earlier, and that the enactment of § 1292(a) in 1948 was merely intended to codify preexisting law. As Judge Coffin described it, § 1292(a) was a "palimpsest," 410 F.2d at 665. On the other hand, § 1292(b) was a brand new statute written in 1958 on a totally clean slate. Moreover, the text of § 1292(a) contains an exception "where a direct review may be had in the Supreme Court" which arguably was intended to encompass all litigation covered by the Expediting Act. There is no comparable exception in § 1292(b). We do not consider the cases construing § 1292(a) applicable to § 1292(b).[12]

The case which provides the Government with its strongest support is *United States v. California Canneries*, 279 U.S. 553. In that case the court of appeals for the District of Columbia

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11. *Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 375 U.S. 39.

12. We also consider inapposite the dicta in *Brown Shoe Co. v. United States*, 370 U.S. 294, 304-305, which was merely directed at the issue of finality.

had entertained an appeal from an order denying leave to intervene; the Supreme Court reversed, holding "that by reason of the Expediting Act the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Anti-Trust Act in which the United States is the complainant. . . ." 279 U.S. at 559. Earlier in the opinion, Mr. Justice Brandeis noted that the Expediting Act limited the right of review to an appeal from a final decision and "precluded the possibility of an appeal to either court from an interlocutory decree." 279 U.S. at 558. These comments are especially forceful because the Court found it unnecessary to consider the language of the statute which arguably sustained the jurisdiction of the court of appeals, but instead relied entirely on the effect of the Expediting Act.

Nevertheless, *California Canneries* must be considered in its context. In 1929, when that case was decided, the section of the District of Columbia Code which had been invoked to sustain jurisdiction of an interlocutory appeal had no counterpart in the general statutes conferring jurisdiction on federal appellate courts in other circuits. It would have been most anomalous for Government antitrust litigation to follow one procedural route in the District of Columbia and a different route in the remainder of the country.

Moreover, as the history of § 1292(a) discloses, the enactment of the Expediting Act did eliminate the preexisting right to appellate review of certain interlocutory decrees. The statement to that effect in the Court's opinion cannot, therefore, be taken as an interpretation of the subsequently enacted statute, particularly since the 1958 statute is consistent with an expediting purpose, whereas the procedure condemned in *California Canneries* had a dilatory effect.

Finally, we reject the Government's argument that it would be anomalous for a court of appeals to pass on controlling questions of law in cases which are directly reviewable in the Supreme Court after the entry of final judgment. Whenever we consider

a controlling question in any litigation, our views are subject to final revision by the Supreme Court. The practical objection to our exercise of § 1292(b) jurisdiction in cases covered by the Expediting Act is predicated not on the suggested anomaly, but rather on the risk that our participation in the appellate process might add to the burdens of the Supreme Court. This risk does exist because certain interlocutory orders would become final if reversed on appeal.[13] However, most interlocutory orders would remain interlocutory even if reversed,[14] and none would become final if affirmed. Moreover, the number of cases covered by the Expediting Act is small and the fact that we have power to hear appeals from interlocutory orders does not mean that we must exercise it without restraint. In balance, we are persuaded that the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation as well as in other similarly complex matters.

We hold that we have jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b).

II.

Our conclusion that § 1292(b) is applicable to cases covered by the Expediting Act does not mean that our jurisdiction may be exercised routinely. In every application under § 1292(b) the appellant has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final

13. The order challenged here is an example. See *United States v. Scophony Corp.*, 333 U.S. 795.

14. Hopefully, most reversals would merely require a district court to enter the form of order that should have been entered in the first instance. In such cases the desirability of postponing Supreme Court review of the issue until the entire litigation is completed is certainly outweighed by the desirability of protecting the litigant from the consequences of error. *Cf. United States Alkali Exporters Assn. v. United States*, 325 U.S. 196, 201-204.

judgment.[15] Of paramount importance is the requirement that immediate review will "materially advance the ultimate termination of the litigation." This requirement is of special importance in Expediting Act cases. The policy of that statute dictates prompt action at every stage of a case raising issues of public importance. Moreover, since a court of appeals is not a normal participant in the reviewing process, special care must be taken to avoid the risk that a § 1292 appeal may actually impede, rather than expedite, the conclusion of the entire case.[16]

We are persuaded that it is appropriate to exercise our jurisdiction in this case for four reasons. First, having heard argument on the threshold issue, we have necessarily made some study of the record and the question arising under the Illinois statute, and are prepared to decide it forthwith. Second, if the district court's order is erroneous, the interests of justice, as well as the desirability of concluding the litigation against petitioners promptly, strongly favor immediate review. Indeed, the posture of the issue is such that an application for an extraordinary writ might receive serious consideration from the Supreme Court. *Cf. United States Alkali Exporters Assn. v. United States,* 325 U.S. 196, 201-204;

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15. See *Forgay v. Conrad,* 47 U.S. 201, 205; *Cobbledick v. United States,* 309 U.S. 323, 324-325.

> "The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> "It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the appropriate circuit court of appeals." S. Rep. No. 2434, 85th Cong. 2d Sess. 3, 4, 1958 U.S. Code Cong. & Adm. News 5255.

16. For this reason a stay of proceedings in the district court pending an appeal to this court will seldom, if ever, be appropriate.

DeBeers Consolidated Mines Ltd. v. United States, 325 U.S. 212, 217. Third, the question which is presented arises under an Illinois statute. On questions of state law, the Supreme Court has repeatedly indicated the desirability of having the benefit of consideration by court of appeals judges who are frequently required to dispose of state law issues in their respective jurisdictions.[17] And, finally, the record developed in the district court to support the motion to quash sufficiently parallels the record in *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959), to indicate a strong liklihood that petitioner's position is sound.

We have, therefore, decided to grant the petition for leave to appeal pursuant to § 1292(b). We now consider the merits of the appeal.

III.

Appellants raise no question about the form of the process, the manner in which it was served, the adequacy of notice, or venue. There are some differences between the two appellants,[18] but since they broadly contend that neither is subject to federal jurisdiction in Illinois, they place no emphasis on such differences.

The two companies are parts of one economic enterprise. They have no office or property in Illinois. Their manuafcturing is performed in Great Britain and title to the iron dextran sold to their American customers passes before the product leaves the shores of England. The American distributors are substantial concerns in their own right; each handles many other products and

17. *Huddleston v. Dwyer*, 322 U.S. 232, 237.

18. Benger Labs, a wholly owned subsidiary of Fisons Limited, had negotiated the agreements involved. In 1964 Fisons Pharmaceuticals was formed as a wholly owned subsidiary of Fisons Limited. Benger Labs, though remaining in existence as a subsidiary of Pharmaceuticals, transferred the iron dextran patent and the rights and obligations under the license agreements to Pharmaceuticals. Representatives of Pharmaceuticals visited Illinois on matters of patent litigation in the third circuit and a few other incidental matters. Representatives of Fisons Limited visited Illinois to discuss an incentive proposal relating to a quantity discount and to discuss a marketing survey.

presumably has the financial strength to respond to any claims from their respective customers.

The visits to Illinois by officers of appellants, or their predecessors, have been minimal, primarily relating to the conduct of certain patent litigation in Philadelphia. The facts concerning these visits were developed at length in discovery, but we agree with appellants that it would be somewhat artificial to use these sporadic visits to measure the significance of their contacts with Illinois. We also agree with appellants that similarities between this record and the facts of *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959) necessitate a careful consideration of that case.

There, as here, plaintiffs relied on § 17(1)(a) of the Illinois Civil Practice Act. Grobark was an exclusive distributor of adding machines purchased in New York from Addo and resold in Illinois. The distributorship was terminated and Grobark brought suit in the Circuit Court of Cook County. The Illinois Supreme Court concluded that Grobark and his son were not agents of Addo.

> "They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves. * * *
>
> "As recently announced by the United States Supreme Court in the Hanson case [*Hanson v. Denckla*, 357 U.S. 235], there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts." 158 N.E.2d at 78.

We have concluded that *Grobark* is not controlling here for two reasons, one factual and one legal. The significance of the factual distinction will be apparent if we first place the majority opinion in *Grobark* in proper legal context.

Justice Davis, joined by Justice Schaefer, filed a lucid dissenting opinion, pointing out that the Court's holding did not rest on a construction of the Illinois statute, but rather on the majority's interpretation of the Fourteenth Amendment to the Federal Constitution.[19] Since we are not bound by a state court's answer to a federal question, it is entirely appropriate for us to state our agreement with the dissenting Justices' analysis of federal law as applied to the *Grobark* facts.

As they pointed out, prior to *Grobark* the Illinois Supreme Court had squarely held that §§ 16 and 17 of the Illinois Civil Practice Act reflected a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause. *Nelson v. Miller,* 11 Ill. 2d 378, 143 N.E.2d 673, 679 (1957). Their view was supported by learned comment on the statute both prior[20] and subsequent[21] to *Grobark,* by the majority in *Grobark* itself,[22] and has been reaffirmed in more recent decisions.[23] Thus, it is fair to state that the scope of the Illinois statute is measured by federal standards.

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19. "The opinion finds that the due process clause of the Fourteenth amendment to the United States constitution prohibits the exercise of jurisdiction by the Illinois courts in this case. I do not agree." 158 N.E.2d at 80. We note that the analysis in Chief Justice Daily's majority opinion rested entirely on federal precedent. He did not purport to depart from the basic holding of *Nelson v. Miller,* 11 Ill.2d 378, 143 N.E.2d 673 (1957), discussed in the text at n.20, *infra.*

20. Justice Davis made reference to the following: Cleary and Seder, Extended Jurisdictional Bases for Illinois Courts, 50 N.U.L.R. 599; Joint Committee Comments, Smith-Hurd Anno. Stat., chap. 110, par. 17, p. 164; Jenner and Tone, Historical and Practice Notes, Smith-Hurd Anno. Stat., chap. 110, par. 17, p. 165; Expanded Concepts of State Jurisdiction over Non-residents, O'Connor & Goff, 31 Notre Dame Lawyer, 223. See 158 N.E.2d at 81.

21. See Royce and Mason, Nonresident Jurisdiction in Business Litigation, Part 1, Chicago Bar Record, Vol. 53, p. 100 (1971).

22. 158 N.E.2d at 76.

23. *Coplin v. Thomas, Haab and Botts,* 73 Ill. App.2d 242, 219 N.E.2d 646 (1st Dist. 1966); *Ziegler v. Houghton-Mifflin Co.,* 80 Ill. App.2d 210, 224 N.E.2d 12 (2d Dist. 1967); see *O'Hare International Bank v. Hampton,* 437 F.2d 1173, 1176 (7th Cir. 1971). See also *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961), a tort case making the same point.

Hanson v. Denckla, 357 U.S. 235, on which the *Grobark* majority relied, does reaffirm the constitutional requirement that a nonresident must have certain qualifying contacts with the forum state to be subject to its *in personam* jurisdiction. Moreover, the holding of that case requires us to focus attention on the nonresident rather than simply the unilateral activities of a resident seeking to assert jurisdiction over a foreign defendant.

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington,* 326 U.S. 310, 319." 357 U.S. at 253.

Under the rule as stated in *Hanson,* we believe the record discloses a sufficient relationship between appellants and the transaction of business in Illinois to subject them to federal jurisdiction in the court below. We believe they have purposefully availed themselves of the benefits and protections of local law and commerce, and that their contracts have significantly affected the way in which business is conducted in Illinois.

Appellants are not simply foreign manufacturers whose products are resold in the forum, or foreign patentees whose licensees are free to distribute a patented product locally on such terms as may be advantageous to themselves in the local market. The contractual relationships embody elements of control which the *Grobark* majority found significantly absent in that case.[24]

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24. The majority opinion there stated that the defendant "did not at any time have the right to exercise any control over the distributors; . . . ." 158 N.E.2d at 79.

Appellants have, of course, obtained the benefit and protection of our patent laws.[25] The principal place of business of one of its licensees is located in Illinois. That licensee is also, by reason of a contract separate from though related to the license agreement, an important distributor of iron dextran manufactured by appellants. Although the licensee-distributor is not a common law agent, its home offices in Illinois provide appellants with a significant practical contact with the forum state.[26] If there is a location in the United States where appellants' relationship to American commerce makes it appropriate to sustain jurisdiction over them, Illinois may, therefore, be the least objectionable forum. *Cf. United States v. Scophony Corp.*, 333 U.S. 795, 817.[27]

Sales of iron dextran in Illinois generate both profits and royalties for appellants. The patent license agreement (and the supply agreement which incorporates the restrictions of the license agree-

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25. The patent on iron dextran, U.S. Letters Patent No. 2,820,740, was originally issued on January 21, 1958, and subsequently reissued on April 28, 1959. "They should not be in the position, even though indirectly, to enjoy the fruit but to disavow the situs of the tree from which the fruit was derived." *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971).

26. "The test of whether business was transacted within the state must be applied in the context, not of communication and transportation criteria of yesteryears, but of modern day commercial and personal accelerated relationships. The long arm statutes are comrades of the computer." *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971).

27. It is possible that the real issue is whether it is fairer to make appellants come to Chicago to defend their use of an American patent than to allow them a measure of immunity from attack under the Sherman Act. Judge Hand's comment is relevant:

> "In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 143 (2d Cir. 1930)."

The existence of the patent avoids the problem of "power" to enforce a judgment against a person otherwise beyond the reach of the Full Faith and Credit clause. See *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353.

ment) contains provisions which control aspects of the business activities of the American licensee.[28] Thus, some, if not all, of the principal's economic control over an agent is continuously exercised by appellants over their American representatives. Their continuing relationship, including a significant measure of control over business activities within Illinois, is in our view, sufficient to sustain jurisdiction. See *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223; *Lurie v. Rupe*, 51 Ill. App. 2d 164, 201 N.E. 2d 158 (1st Dist. 1964).[29]

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28. The license agreement with Armour provides in part that (1) the licensee is limited to manufacture, sale, and use for veterinary purposes only; (2) the licensor is to supply promotional literature for use by the licensee; (3) both parties must keep each other informed of their respective research, trade and secret processes, working details, etc.; (4) the licensee must supply samples of its manufactured product to the licensor and withdraw such product if it does not meet the licensor's standards; (5) the licensee cannot use the licensor's trademark and must, after termination of the agreement, assign whatever trademark it does use to the licensor; (6) labeling requirements are imposed on the licensee such that no indication may be given of a possible use of the product other than veterinary use; (7) Illinois law applies and the parties agree to submit certain disputes to a member of the Illinois Bar for resolution. The supply agreement incorporates the restrictions and controls of the license agreement.

We, of course, imply nothing whatever as to the propriety of these provisions as a matter of substantive, in this case antitrust, law. We merely hold that the licensor by the agreement has sufficient control over the business of an Illinois based corporation to provide the minimum contacts with the State of Illinois required under the Illinois long arm statute.

In *United States v. Scophony Corp.*, the Supreme Court stated:

> "We need not decide whether, in view of the agreements' continuing and pervasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district." 333 U.S. 795, 814.

29. "Traditional notions of fair play and substantial justice is the essence of due process in the area of jurisdiction over non-resident defendants and it is no violation of such notions to provide that this case be tried in the Courts of Illinois." *Ziegler v. Houghton-Mifflin Co.*, 80 Ill. App. 2d 210, 224 N.E.2d 12, 16 (2d Dist. 1967).

The order entered by the district court on August 27, 1971, is affirmed.

A true Copy:

Teste:

/s/ WILLIAM H. PITTMAN
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

SUPREME COURT, U. S.

FILED

MAR 13 1972

No. 71-366

In the Supreme Court of the United States

OCTOBER TERM, 1971

TIDEWATER OIL COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA AND
PHILLIPS PETROLEUM COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF THE UNITED STATES TO THE PETITION FOR REHEARING

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RESPONSE OF THE UNITED STATES TO THE PETITION FOR REHEARING

As requested by the Court, this memorandum is filed in response to the petition for rehearing filed by petitioner Tidewater Oil Company on January 21, 1972. Tidewater brings to the Court's attention the fact that after the Court's denial of its petition for a writ of certiorari on November 9, 1971, the Court of Appeals for the Seventh Circuit, on January 5, 1972, rendered a decision in direct conflict with that challenged here. See *Fisons Limited and Fisons Pharmaceuticals, Ltd.*

v. *United States,* Misc. No. 1235 (Pet. for Rehearing, App. 1-18). A petition for a writ of certiorari presenting questions not pertinent here was filed in the *Fisons* case on January 31, 1972, No. 71-971, October Term, 1971.

The United States agrees with Tidewater that a conflict among the circuits presently exists on the question whether, in a civil antitrust action brought by the United States, a court of appeals is barred by the Expediting Act, 15 U.S.C. 29, from asserting jurisdiction over an interlocutory appeal certified pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b). The resolution of this conflict is of general and continuing importance to the proper implementation of the nation's antitrust policy. Hence, we concur in the request that the petition for rehearing be granted.

Three circuits have considered this question. The Court of Appeals for the District of Columbia Circuit in *Farbenfabriken Bayer, A.G.* v. *United States,* 1968 Trade Cases ¶ 72,570 (C.A.D.C.), certiorari denied, 393 U.S. 959,[1] and the Court of Appeals for the Ninth Circuit in the present case (Pet. App. A), held that the Expediting Act bars the courts of appeals from considering such interlocutory appeals. Both courts relied upon *United States* v. *California Cooperative Canneries,* 279 U.S. 553, 558, which held that Section 2 of the Expediting Act precludes interlocutory appeals in government civil antitrust cases since Section 2 permits appeals in such cases only from "final judgments" of the district court.

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[1] See also, *Glaxo Group Limited* v. *United States,* C.A.D.C., Misc. No. 3261 (unreported order of June 25, 1968).

The Court of Appeals for the Seventh Circuit reached a contrary conclusion in *Fisons,* holding that "the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation as well as in other similarly complex matters" (Pet. for Rehearing, App. at 10). The Seventh Circuit thus refused to apply *California Canneries* because, in the court's view, that case dealt with a unique statutory provision —the discretionary appeal provision of Section 226 of the District of Columbia Code, 31 Stat. 1225—and involved different policy considerations (*id.* at 9). Having concluded that it possessed appellate jurisdiction under Section 1292(b), the court in *Fisons* then decided the merits of the appeal and affirmed the district court's assertion of *in personam* jurisdiction over the defendants pursuant to Section 17(1) (a) of the Illinois Civil Practice Act, Ill. Rev. Stat. 1955, Chap. 110, par. 17(1) (a).

For the reasons set forth in our Brief in Opposition in this case, filed on October 13, 1971, we submit that the decision of the Ninth Circuit below is correct and that *Fisons* is wrongly decided in this respect. In light of the likely recurrence of efforts to obtain interlocutory relief in government civil antitrust cases, and the resulting confusion and delay, the existing conflict should be promptly resolved. Review by this Court of the present case is therefore warranted.

We are simultaneously filing a brief in opposition to the petition in the *Fisons* case. That petition does not raise the jurisdictional issue, because the Seventh Circuit's decision was favorable to the petitioners in that

respect. As to the questions presented in *Fisons,* which involve construction of the Illinois long-arm statute, we do not believe that review by this Court is appropriate, as we argue in our Brief in Opposition. By granting, on rehearing, the petition for a writ of certiorari in this case, however, the Court can resolve the existing conflict regarding application of the Interlocutory Appeals Act in cases governed by the Expediting Act.

Respectfully submitted.

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MARCH 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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vs.

UNITED STATES OF AMERICA and PHILLIPS PETROLEUM COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Petitioner Tidewater Oil Company

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Petitioner Tidewater Oil Company

OPINION

The opinion of the court below is its one sentence order plus one citation. It is not reported but is set out as Appendix 2 hereto.

No formal opinion was rendered by the district court, but pertinent excerpts from the reporter's transcript of its oral remarks are in Appendix E to the Petition for a Writ of Certiorari.[1] Its earlier opinion on another phase of the case appears in *United States v. Phillips Petroleum Company and Tidewater Oil Company,* 1966 Trade Cas. ¶ 71,872.

All emphasis in quotations has been added, unless otherwise stated.

1. Incorporated by reference at p. 24 of the single Appendix here.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The district court had jurisdiction under the Clayton Act, §§ 7 and 15, Act of October 15, 1914, c. 323, 38 Stat. 731, 736, as amended, 15 U.S.C. §§ 18 and 25.

The jurisdiction of the Court of Appeals is the question in issue, under 28 U.S.C. § 1292(b). Its order was rendered July 28, 1971. The petition for certiorari to review that order was filed on September 14, 1971 and was denied on November 9, 1971. On January 21, 1972, petitioner filed a Motion for Leave to File Out-of-Time Petition for Rehearing and Petition for Rehearing of Order on Petition for a Writ of Certiorari because the Seventh Circuit had decided the identical question in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America*, ... F.2d .....,[2] 1972 Trade Cas. ¶ 73,790 (Jan. 5, 1972), in direct conflict with the court below. The Solicitor General advised the Court that the "resolution of this conflict is of general and continuing importance to the proper implementation of the nation's antitrust policy." On March 20, 1972, the Court granted the motion, vacated its order of November 9, 1971, and granted the petition for certiorari.

QUESTION PRESENTED

In a civil antitrust action brought in a district court by the United States, does a Court of Appeals have jurisdiction to entertain a petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the district court which certifies that it involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation?

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2. Not yet reported. A copy of the opinion is attached to the Petition for Rehearing.

STATUTES INVOLVED

Section 7, Clayton Act, Act of Oct. 15, 1914, c. 323, 38 Stat. 731, as amended, 15 U.S.C. § 18:

> "* * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

28 U.S.C. § 1292(b) (Interlocutory Appeals Act, 1958):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The Expediting Act of 1903, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended (15 U.S.C. § 29):

> "In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

STATEMENT OF THE CASE

In March, 1966, petitioner ("Tidewater") contracted with Phillips Petroleum Company ("Phillips") to sell a portion of its western assets to Phillips. At the request of the Antitrust Division of the Department of Justice, Tidewater and Phillips voluntarily

postponed the consummation from the agreed date, June 30, to July 14, 1966. On July 13 the United States filed a complaint in the district court in Los Angeles against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Clayton Act, Section 7, and applied for a temporary restraining order against the consummation of the transaction. Because of absence of the judge, the application could not be heard until after the hour set for consummation the next day. Tidewater and Phillips, "in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination." The court "denied the requested restraining order, thus permitting the transaction to be closed." Later, after receipt of extensive evidence, plaintiff's motion for a preliminary injunction was denied with opinion (1966 Trade Cas. ¶ 71,872) and upon a full set of findings.[3]

Restraint having been denied, Tidewater sold the agreed assets and transferred title to Phillips. The case then proceeded as one to compel divestiture by Phillips of the acquired assets, and Tidewater was wholly inactive in the case except to respond to plaintiff's discovery. When eventually plaintiff informed the district court that it had completed its discovery and was ready to go to trial, Tidewater moved to dismiss, as against it,[4]

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

The district court denied the motion but volunteered a certification for interlocutory appeal under 28 U.S.C. § 1292(b), because of

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3. Those findings are set out in App. C to the petition for certiorari, incorporated by reference at p. 24 of the single Appendix hereto, and are the source of the facts stated above.

4. Its motion is set out in App. D to the petition for certiorari, incorporated by reference at p. 24 of the Appendix here.

the importance of the question and doubt as to the correctness of its decision. Its formal order[5] on the motion, June 24, 1971, contained the certification. Within the ten days provided by that section, on June 30, 1971, Tidewater filed its petition in the court below for permission to appeal under 1292(b) (Appendix 3, p. 4).

On July 28, 1971, that court denied the petition by a one sentence order and opinion (Appendix 2):

> "The petition for leave to appeal under 1292(b) is denied. *United States v. Ford* [*sic "Food"*] *Machinery Corporation*, 9 Cir., 321 F.2d 534."

The appeal in the cited case (the correct designation of which is *United States v. FMC Corp.*, 321 F.2d 534) was "taken [by the United States] under 28 U.S.C. § 1292(a)(1) from an order denying a motion for a preliminary injunction". After stating the nature of the case and of the appeal, the opinion and order there said:

> "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act of 1903 (c. 544, 32 Stat. 823) now 15 U.S.C. § 29. See [citations]. We are unable to agree with the contrary decision of the Third Circuit in United States v. Ingersoll-Rand Co., 1963, 320 F.2d 509 (June 5, 1963)."

Thus the reason for denying Tidewater leave to appeal here was solely the belief that the Court of Appeals lacked jurisdiction. The writ of certiorari has issued to review that determination.

ARGUMENT

We submit that Courts of Appeals do have jurisdiction to entertain appeals under 28 U.S.C. § 1292(b) in government antitrust suits.

Three circuits have decided the precise question, the Ninth in this case, the District of Columbia Circuit in *Farbenfabriken Bayer*,

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5. Appendix B to petition for certiorari, also found at pp. 14-15 of the Appendix here.

A. G. v. United States, 1968 Trade Cas. ¶ 72,570, cert. den. 393 U.S. 959,[6] and the Seventh Circuit in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America,* ..... F.2d ....., 1972 Trade Cas. ¶ 73,790. The Ninth and the District of Columbia Circuits held that Courts of Appeals lack jurisdiction but without analysis or discussion; their orders merely contained bare citations. The Seventh Circuit analyzed the question in a careful opinion and reached the opposite holding. The First Circuit in *United States v. Cities Service Company,* 410 F.2d 662, 670 (1969), has expressed dictum in favor of appealability under § 1292(b).

This Court has often observed how much its work is eased by having cases screened through the Courts of Appeal. *United States v. Ballard,* 322 U.S. 78, 88 (1944); *United States v. Sheridan,* 329 U.S. 379, 392 (1946). By the time § 1292(b) was first enacted (in 1958), doubt was growing about the wisdom of departing from that practice in antitrust cases and in routing them directly to this Court. Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 175n (1963), the Court said:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

Expedition, it was coming to be believed, was better secured by screening cases through the Courts of Appeals. Mr. Justice Clark had made similar observations in a concurring opinion, *Brown Shoe Co. v. United States,* 370 U.S. 294, 355, 364 (1962), as had Mr. Justice Harlan in *United States v. Borden Co.,* 370 U.S. 460, 477 (1962). Just recently the Chief Justice, in *Ford Motor Co.*

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6. The Solicitor General has also cited an unreported order of the District of Columbia Circuit in *Glaxo Group, Ltd. v. United States,* Misc. No. 3261 (June 25, 1963).

v. United States, U.S. , 92 S.Ct. 1142, 1972 Trade Cas. ¶ 73,905 (March 29, 1972) observed, albeit in a dissenting opinion:

> "This case illustrates the unsoundness of the direct appeal permitted in cases of this kind under 15 U.S.C. § 29. In a factually complicated case like this, we would be immeasurably aided by the screening process provided by a Court of Appeals review. Limited expediting of such cases, under the discretion of this Court, would satisfy all needs justifying direct review in this Court."

Courts cannot create an appellate jurisdiction not created by Congress, however desirable, but what Congress has conferred they should not reject. 28 U.S.C. 1292(b) is a modern innovation serving the desirable purpose and enacted over 50 years after the Expediting Act. That section manifests a break with traditional notions and expresses the entirely modern view that interlocutory appeals on important issues are a useful updating of judicial administration. Yet, if no such appeal can be taken to a Court of Appeals under § 1292(b) in a government antitrust suit, that useful device is denied to government antitrust litigation, for no statute provides for an interlocutory appeal directly to this Court.

It is imperative to observe that two entirely different kinds of interlocutory appeals are provided by the judicial code, each with a different language, history and purpose. The first and earliest in time is covered by 28 U.S.C. § 1292(a) and relates to certain collateral proceedings in a case—orders granting or denying interlocutory injunction or relative to receiverships.[7] The second is

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7. Apart from certain patent and admiralty matters.
§ 1292(a) reads:
"(a) The courts of appeals shall have jurisdiction of appeals from:
"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or

provided for in 28 U.S.C. § 1292(b) and relates, not to collateral matters, but to important questions in the direct stream of the case, which, if properly determined early, will save time and energy of courts and litigants.

The history of § 1292(a) has led some courts to deny jurisdiction of appeals under that section to Courts of Appeals in government civil antitrust actions. The citation in the order of the court below shows that it assumed an identity of the question of appealability under § 1292(b) with that of appealability under 28 U.S.C. § 1292(a). This also appears as the basis of decision of the District of Columbia Circuit. As we shall show, there is no such identity. Section 1292(a) is an old provision with a long history and a certain purpose. 1292(b) is an innovation in the law. Its language, history and purpose are totally different. And the question is whether anything in *that* language, history and purpose defeats its salutary application.

The Language of § 1292(b) Clearly Confers Jurisdiction on the Court of Appeals

The necessary place to start, if not to end, analysis is the language of the pertinent statutes.

The Expediting Act of 1903 (15 U.S.C. § 29) provides that in civil actions by the United States under the antitrust acts,

> "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court."

28 U.S.C. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable . . . [shall make the proper certification] * * * The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

Thus, § 1292(b) by its language applies to *any* civil action, and the Expediting Act relates only to appeals from *final* judgments.

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modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:"

"A civil action" is all inclusive. It includes government antitrust cases. The Expediting Act carves out no exception, for that Act relates only to final judgments, while 1292(b) relates only to interlocutory orders. The Seventh Circuit pithily put it this way in the *Fisons* case:

> "By its terms, § 2 of the Expediting Act applies to appeals from final decrees in a limited category of cases. The Interlocutory Appeals Act of 1958 makes no reference to final orders and its language is applicable to all civil litigation in the federal district courts. * * *
>
> "A plain reading of the two statutes reveals no inconsistency between them. If they had been enacted simultaneously, the language of each could be given full effect without limiting the scope of the other. If some conflict in literal meaning did exist, under normal rules of construction the later statute would prevail. *United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 912 (7th Cir. 1942); *Eisenberg v. Corning*, 179 F.2d 275, 276 (D.C. Cir. 1949)." [p. 91,344.]

Thus, looking solely to the language of the two statutes, the Expediting Act is no bar to an interlocutory appeal under § 1292(b).

United States v. Cities Service Company, 410 F.2d 662, 670n (1 Cir. 1969), involved the question whether the Expediting Act precludes an interlocutory appeal to a Court of Appeals under 1292(a), not 1292(b), and held that it did. But it said this, by way of dictum, of 1292(b):

> "It is at least arguable that by its literal terms the certification procedure of § 1292(b) permits interlocutory appeals in government antitrust cases since § 1292(b) covers appeal not otherwise allowed by § 1292(a). *See* Comment, The Antitrust Expediting Act—A Critical Reappraisal, 63 Mich. L. Rev. 1240, 1245n. 48 (1965). Moreover, § 1292(b) appeals do not suspend a consideration of the merits unless a stay is issued by the court of appeals. On the other hand § 1292(b) appeals would involve possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court. Unfortunately, the legislative history of

§ 1292(b) provides no illumination on a resolution of these interests."

We show below that there is no "conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court". Policy means Congressional intent, and that must be gathered in the first instance from statutory language. The supposed "possible conflict" referred to in the quotation is derived from the history, purpose and language of interlocutory appeals under what is now 1292(a), and that, as we show by a brief review below, is completely inapplicable.

Purpose of Section 1292(b).

The conclusion mandated by the language of § 1292(b) is supported by its purpose. That statute, enacted in 1958, created an entirely new practice. Its genesis and the impetus for its enactment were the recognition that there *are* situations where an interlocutory appeal will expedite litigation rather than impede it. The Senate Report on the bill that became § 1292(b) stated[8]:

> "This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. * * * The bill results from a growing *awareness of the need for expedition* of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable".[9] (p. 5256).

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8. Senate Report No. 2434, August 18, 1958, 3 U.S. Code Congressional and Administrative News, 85th Cong., 2nd Sess., at p. 5255.

9. So here; had the district court granted Tidewater's motion to dismiss, its order would have been appealable as final.

> "The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. * * * Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." (p. 5257).

As a most vivid example of cases calling for interlocutory appeals, the report pointed to antitrust, saying:

> "There are many civil actions from which similar illustrations could be furnished. For example, *in an antitrust action* a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. *Disposition of antitrust cases may take considerable time,* yet upon appeal following final disposition of such cases the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." (p. 5256).[10]

The genesis and impetus of the Expediting Act are exactly the same, namely, to expedite litigation and not impede it. The Expediting Act was motivated by the view that government antitrust cases are of such importance that they should be expedited, *Shenandoah Broadcasting v. Ascap,* 375 U.S. 39 (1963); *United States v. Cities Service Co.,* 410 F.2d 662, 664 (1 Cir. 1969) In reporting the bill that became the Expediting Act, Senator Fairbanks said (36 Cong.Rec., 1679):

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10. The Seventh Circuit, in the *Fisons* case, quoted this passage and said that "with only slight changes, [it] might have been written of the very case before us" (p. 91,344). That is true here.

> "* * * every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object."

It has been remarked: "The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision. Experience with that section has shown the wisdom of the Congressional decision." 5 Harvard Journ. on Legislation 55, 64 (1967).

The provision about appeals is Section 2 of the Expediting Act. Section 1 of the same Act provided that government antitrust cases would be heard by a panel of judges upon the certificate of the attorney general. This is now 15 U.S.C. § 28, which provides for a panel of three. The House Report on the bill[11] explains this provision by quoting a letter of the Attorney General as follows:

> "There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts,
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> * * *
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> "The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of circuit judges *would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals.*"

Permitting interlocutory appeals under 28 U.S.C. § 1292(b) will serve both the purpose of speeding litigation and of giving the case a screening before issues reach this Court. Thus § 1292(b) and the Expediting Act are animated and informed by precisely the same objectives and warranted by precisely the same circumstances. They should be read together as supplementing each other, not read as antagonistic. And if any repugnancies were

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11. House Report No. 3020, 57 Cong., 2nd Sess., January 9, 1903.

present, the later Act would necessarily control all intendments. *United States v. Yuginovich,* 256 U.S. 450, 463 (1921); *United States v. Tynen,* 78 U.S. 88, 92 (1870). The Seventh Circuit summed up thus in the *Fisons* case (pp. 91,344-45):

> "The purpose of the 1958 Act is consistent with the expediting purpose of the 1903 Act. Although it authorizes a departure from the general practice of postponing appellate review until after the entry of a final judgment, such authorization is only for the purpose of materially advancing the ultimate termination of the litigation. The specified procedure must be invoked within ten days and shall not stay proceedings in the trial court unless a judge shall expressly so direct.
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> "The legislative history of the Interlocutory Appeals Act indicates that it was intended to apply to protracted cases, including antitrust litigation. Indeed, it is fair to infer that its primary efficacy was expected to occur in cases of exceptional magnitude. In sum, the plain language, the purpose, and the history of the Interlocutory Appeals Act of 1958 are all consistent with its application to civil antitrust litigation commenced by the United States."

The court added in a footnote:

> "We recognize that the examples of antitrust litigation referred to in the Senate Committee Report were apparently private cases and that no unambiguous reference to Government litigation appears. The many federal judges who participated in the consideration of the proposed legislation, however, were certainly familiar with appellate procedure in both private and Government antitrust litigation, whether civil or criminal."

The Contrast With the Language and History of 1292(a)

28 U.S.C. § 1292(a) is derived from the Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7). That Act provided as follows:

> "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, *in a cause in*

> *which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals,* an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: * * *."[12]

Since the Evarts Act, as enacted in 1891 and amended in 1900, provided in the plainest possible language for certain interlocutory appeals to a Court of Appeals only in cases "in which an appeal from a final decree may be taken * * * to the circuit court of appeals", and since the Expediting Act deprived the Courts of Appeals of jurisdiction over appeals from final judgments in government instituted antitrust cases, upon enactment of the Expediting Act the language of the Evarts Act ceased to provide for interlocutory appeals.

Thus, at its birth, the Expediting Act plainly deprived Courts of Appeals of jurisdiction over 1292(a) type of interlocutory appeals—the only kind then authorized—in government antitrust suits. The debate has turned on whether subsequent textual changes altered the law on 1292(a) appeals.

In 1906 the Evarts Act was amended[13] to substitute the words "in any cause" for the words "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals". Not until the Act had been amended once again was the question raised, years later, whether the 1906 change expanded the reach of the Evarts Act. Upon the basis of the history of the peculiar purpose and motivation of the 1906 amendment as being to defeat certain evasive tactics in pl..ding, and noting that the amendment was enacted only 3 years after the Expediting Act, yet without referring to it, courts concluded that the 1906 amend-

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12. By the Act of June 6, 1900, c. 803, 31 Stat. 660, the Evarts Act was amended to extend to orders concerning receivers. The language "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals" remained.

13. By the Act of April 14, 1906, 34 Stat. 116.

ment was not intended to work that expansion (see *United States v. Cities Service Company,* 410 F.2d at 666-67).

The phrasing was again changed in 1911 upon codification of various statutes into the Judicial Code. Section 7 of the Evarts Act became Section 129 of the Code (36 Stat. 1087, 1134), and the words "in any cause" were replaced by the words "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court". The new phrasing did not say "notwithstanding an appeal . . . might, upon final decree . . . be taken *only* to the Supreme Court". In *United States v. Ingersoll-Rand Co.,* 320 F.2d 509, 512 (1963), the Third Circuit held that the 1911 change "assuredly had the effect" of making interlocutory injunctive and receivership orders in government antitrust suit appealable to Courts of Appeal. The First Circuit, in the *Cities Service* case, 410 F.2d at 667, held otherwise, because, while "the language is sweeping", there was "no indication that any substantive change in the Expediting Act was intended. Nor, apparently, was any attempt made to take advantage of the language."

Whether the First or Third Circuits has the better of the reasoning is moot because in 1925, 43 Stat. 936, 937, inaugurating this Court's certiorari jurisdiction, re-codified the Judicial Code and deleted the "notwithstanding" clause of Section 129 of the Judicial Code of 1911. According to a memorandum accompanying the bill, the "notwithstanding clause" was "eliminated as having no further application in view of the repeal of the existing provisions of Section 238 providing for direct appeals."[14] This ambiguous explanation left the situation as it had been, that is, in the context of an Act which, when first enacted in 1903, plainly precluded an interlocutory appeal on injunctions to Courts of Appeal. As said in *Cities Service,* at pp. 668-669, "If the 1911 'notwith-

14. Cited both in *United States v. Ingersoll-Rand,* 320 F.2d at 512, 513, and *United States v. Cities Service Company,* 410 F.2d at 668-9.

standing' language did not create such jurisdiction, then dropping such language because the same coverage could be achieved without it could be no more effective."

The next event was the revision of the Judicial Code in 1948, as Title 28 U.S.C. (62 Stat. 929). The Evarts Act became 28 U.S.C. § 1292(a). As so codified, 1292(a) permits an appeal to a Court of Appeals of interlocutory injunctive and receivership orders "except where a direct review may be had in the Supreme Court". As this Court has review under the Expediting Act only from final judgments, it has none from interlocutory orders. The Third Circuit in *Ingersoll-Rand, supra,* therefore held that the 1948 enactment operated to vest jurisdiction in Courts of Appeals over such interlocutory orders in government instituted antitrust cases. Said it (320 F.2d at 517):

> "In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which interlocutory order is directly reviewable by the Supreme Court."

On the other hand, the First Circuit pointed to the statements in the reviser's notes to the 1948 recodification that no substantial changes were intended by the recodification, and it cited this Court's decision to that effect, *Fourco Glass Co. v. Transmirra Prod. Corp.,* 353 U.S. 222, 227 (1957). Therefore the First Circuit, disagreeing with the Third, held that the 1948 codification effected no change.

In between *Ingersoll-Rand* and *Cities Service,* both containing long discussion, came the decision of the court below in *United States v. FMC Corporation,* 321 F.2d 534 (1963), the basis of its decision in the present case. That case concerned appealability under § 1292(a) to a Court of Appeals of an order denying a preliminary injunction. Without analysis or discussion it stated baldly, "We are of the opinion that we lack jurisdiction of this

appeal, by reason of the provisions of the Expediting Act of 1903". Its authority for this proposition was the several citations we discuss below at pp. 18-24.

Thus, since the 1948 amendment, on appealability in government antitrust suits of interlocutory orders described in § 1292(a), there is conflict among the circuits, the First and Ninth opposed to the Third. The question has never reached this Court.[15]

And in all these cases it has been the Department of Justice that has argued that interlocutory orders under Section 1292(a) are appealable to the Courts of Appeals. It is an oddity that, as respects Section 1292(b), where jurisdiction of the Courts of Appeals is so much clearer, the Department makes an about-face.

Even courts voting against appealability of 1292(a) orders consider that conclusion to be unfortunate[16] but compelled by history. The case against appealability of § 1292(a) orders to a Court of Appeals must rest on the statement in *United States v. California Canneries,* 279 U. S. 553 (1929), repeated in a footnote dictum in *Brown Shoe.*

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15. Inasmuch as the Court of Appeals in *Ingersoll-Rand* affirmed an interlocutory injunction appealed by the defendant, neither party had any incentive to seek review by this Court of the question of appealability. In the *FMC* case, the district court had denied a preliminary injunction against an acquisition, and the United States appealed to the Ninth Circuit. When that court stated that it lacked jurisdiction, the United States applied to Mr. Justice Goldberg for a stay pending a petition for certiorari. When he denied the stay, the acquisition occurred, thus mooting the question so that no petition for certiorari was filed. In his opinion denying the stay (*United States v. FMC Corp.*, 11 L.Ed.2d 20), Mr. Justice Goldberg, not writing for this Court but as a single circuit justice, concluded that the 1948 revision of the Judicial Code had not altered the previous historical construction of the Expediting Act.

16. For example, the First Circuit in the *Cities Service* case, *supra,* remarked (p. 669):

> "We realize that time has made ancient good much less couth than it was in 1903, and that requiring Supreme Court review of final district court actions in government civil antitrust cases and barring any court of appeals review of interlocutory orders make little sense today. The call for another—and hopefully less ambiguous—change in jurisdiction has been sounded on both the judicial and legislative fronts."

We therefore consider those cases and examine whether they have any bearing on appealability under Section 1292(b).

United States v. California Canneries, 279 U.S. 553 (1929), and Its Inapplicability to Interlocutory Appeals Under 28 U.S.C. § 1292(b).

The first fact to note is that *California Canneries* was not an independent suit but arose out of *Swift & Company v. United States,* 276 U.S. 311 (1928), a government antitrust case in which a final decree had been entered in the district court and affirmed. *California Canneries* was a post-judgment proceeding in the *Swift* case. After the *final* decree in *Swift,* California Canneries sought to intervene to vacate that *final* decree, and its motion was denied. On appeal in 1924 the Court of Appeals for the District of Columbia reversed the order denying intervention. On certiorari this Court held that the Court of Appeals had no jurisdiction. In doing so it added in the opinion by Mr. Justice Brandeis (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller,* 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

It is to this sentence that the government gives an exaggerated meaning as controlling the question now before the Court. But to attribute that meaning to the sentence is to attribute to Mr. Justice Brandeis' dictum an uncalled for weight. It was dictum because the order appealed from was *not* interlocutory at all. It was a *post-judgment* order, and, as such, historically considered a *final* order for purposes of appeal. A decree, like that in *Swift & Co. v. United States, supra,* that an acquisition is illegal and must be undone, is final for appeal to this Court, although a plan of

divestiture remains to be ordered. *Brown Shoe Co. v. United States,* 370 U.S. 294, 305 (1962). The subsequent order putting a plan into effect is also appealable as a final order. *Cascade Nat. Gas v. El Paso Nat. Gas,* 386 U.S. 129 (1967). So is a subsequent contempt order. *First Security Nat. Bank v. United States,* 382 U. S. 34 (1965). It is the general rule that post-judgment orders are appealable as final orders, unless they too are merely interlocutory to some post-judgment procedure. 9 Moore's Federal Practice (2d ed.) ¶ 110.14, and cases cited. Orders denying interventions after a judgment decreeing an acquisition to be illegal are appealable directly to this Court as final orders. *Cascade Nat. Gas v. El Paso Nat. Gas,* 386 U.S. 129, 132 (1967); *Missouri-Kansas Pipe Line Co. v. United States,* 312 U.S. 502 (1941).

Consequently, the order denying intervention to California Canneries in the *Swift* case was appealable to this Court, and only to this Court, because it was a *final* order and therefore not appealable to a Court of Appeals. An attentive reading of the opinion in the *California Canneries* case shows that this is what the Court was holding. The argument there made by appellant to sustain the Court of Appeals' exercise of jurisdiction was that the appeal from the order denying intervention, though post-judgment, was "not 'an appeal from the final decree'; because the Canneries was not at the time of its appeal a party" to the suit (279 U.S. at 557, 558). The Court replied that it was immaterial that appellant appeared in the posture of an intervener. It observed that in *Continental Insurance Co. v. United States,* 259 U.S. 156, it had held that an appeal by one permitted to intervene was just like an appeal by one of the original parties, so far as appealability to this Court was concerned (p. 559). It further observed that it had been held that "in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal *thereafter* taken in the cause was necessarily also to this Court" (p. 559), citing *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.,* 249 U.S. 134, 140 (1919). There the appeal had been taken by interveners from

an order rejecting claims presented pursuant to and following a final decree.

Moreover, referring again to the quoted passage from *California Canneries* and particularly the sentence,

> "Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller,* 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree",

it will be seen that the only authority cited is *Collins v. Miller.* But *Collins v. Miller* was merely an attempted appeal from orders which the Court held were not final (on petition for *habeas corpus* and certiorari) and where there was no statute relating to interlocutory appeal. The Court there merely expressed the then policy of the law not to permit interlocutory appeals. That, however, was merely a statement concerning the policy expressed in legislative mandate. The vice in the government's position here is that it would elevate this quondam legislative policy to one of permanent Constituitional prohibition, or, indeed, to some fundamental of the *lex naturae.* By the Interlocutory Appeals Act of 1958 Congress made a sharp break with the old policy against interlocutory appeals. Such a break was the very purpose of the enactment.

If it be granted that the quoted sentence from *California Canneries,* although dictum, represented the views of this Court, *the views it represented* were in a *precise historical context, i.e., the state of the statutory law in 1925.* As said in *Ingersoll-Rand,* (320 F.2d at 516):

> "The basis for the Supreme Court's decision as stated in California Canneries is perfectly plain. It was that the Expediting Act amended the prior law and did away with appeals from interlocutory orders and decrees in anti-trust suits."

In short, the Expediting Act was enacted after the Evarts Act, and nothing in subsequent amendments, at least until the 1948 revision, showed any Congressional intention to effect a change.

And, further, *California Canneries* had nothing to say about interlocutory appeals under § 1292(b) because that procedure was 29 years in the future.

Whatever may be said about 1292(a), the case as to 28 U.S.C. 1292(b) is clear. It was enacted 55 years after the Expediting Act and 29 years after *California Canneries*. In *California Canneries* this Court was expressing a judgment on what Congress had done, not on what it could do or on the effect of what it would do 29 years later.

In the *Fisons* case the Seventh Circuit makes these very distinctions about the *California Canneries* case, saying:

> "None of these [government] arguments [opposing appealability under § 1292(b)] questions the wisdom of applying the 1958 Act to this type of case, or suggests any conflict between the language or the policy of the two statutes. In essence, it is the Government's position that the Expediting Act is an especially important statute which has been construed to mean a great deal more than it says, and specifically to foreclose interlocutory appeals; . . .
>
> "First, we note that the Expediting Act is just another statute. It has been on the books a long time and it deals with important litigation. But the statute itself commands no special respect today. It has been criticized by Supreme Court Justices and other scholars, and narrowly construed to permit a court of appeals to participate in appellate review of at least one civil antitrust case in which the Government was a party. We do not consider our appraisal of the question presented here as an intrusion on hallowed ground.
>
> "Second, we note the significant difference between this question and the issues raised by attempts to appeal from orders granting or denying preliminary injunctions pursuant to § 1292(a) of the Judicial Code. That section has a dramatically different history, as well as a significant difference in its language, from § 1292(b).
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> * * *
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> "It is sufficient to note that the enactment of the Expediting Act in 1903 was a chapter in that history which had com-

> menced earlier, and that the enactment of § 1292(a) in 1948 was merely intended to codify preexisting law. * * * On the other hand, § 1292(b) was a brand new statute written in 1958 on a totally clean slate. Moreover, the text of § 1292(a) contains an exception 'where a direct review may be had in the Supreme Court' which arguably was intended to encompass all litigation covered by the Expediting Act. There is no comparable exception in § 1292(b). We do not consider the cases construing § 1292(a) applicable to § 1292(b). [p. 91,345]
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> * * *
>
> "Moreover, as the history of § 1292(a) discloses, the enactment of the Expediting Act did eliminate the preexisting right to appellate review of certain interlocutory decrees. The statement to that effect in the Court's opinion cannot, therefore, be taken as an interpretation of the subsequently enacted statute, particularly since the 1958 statute is consistent with an expediting purpose, whereas the procedure condemned in *California Canneries* had a dilatory effect." (p. 91,346)

The *Fisons* case points to another reason why the *California Canneries* case is inapplicable. The appeal there was taken, not under any general statute, but under a special provision of the District of Columbia Code. In *Fisons* the court said (p. 91,346):

> "* * * *California Canneries* must be considered in its context. In 1929, when that case was decided, the section of the District of Columbia Code which had been invoked to sustain jurisdiction of an interlocutory appeal had no counterpart in the general statutes conferring jurisdiction on federal appellate courts in other circuits. It would have been most anomalous for Government antitrust litigation to follow one procedural route in the District of Columbia and a different route in the remainder of the country."

In the *Canneries* case this Court had expressly said (279 U.S. at 558, 559) that in antitrust cases the rules for the District of Columbia were the same as for the rest of the country:

"For the enforcement of the Anti-Trust Act within the District of Columbia, its Supreme Court has jurisdiction corresponding to that which is exercised by the federal district courts in the several districts; and the appellate jurisdiction of the Court of Appeals of the District corresponds to that of the several Circuit Courts of Appeals."

Brown Shoe and Other Cases Relied On by the Government.

The government, in opposition to our petition for certiorari, has relied heavily on a footnote in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). But that case did not involve any question of appeal to a Court of Appeals. It was a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. In a footnote, constituting a complete aside, it nearly quoted from *California Canneries* (370 U.S. at 305, fn. 9):

"Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States v. California Cooperative Canneries,* 279 U.S. 553, 558."

While *Brown Shoe* post-dates the enactment of § 1292(b) by about four years, the issue of jurisdiction of a Court of Appeals over an interlocutory appeal under 1292(b) was not involved, and the new Act was not before it.[17] Therefore *Brown Shoe* is no authority on that point. *Webster v. Fall,* 266 U.S. 507, 511 (1925); *Nashville Milk Co. v. Carnation Co.,* 355 U.S. 373, 376, 383 (1958); *United States v. More,* 3 Cranch (7 U.S.) 159, 172.

28 U.S.C. § 1292(b) is the latest expression of Congressional will. It is plain in its language and requires no interpretation from

17. The Solicitor General's brief in opposition to our petition for certiorari agreed (p. 8) that "petitioner correctly notes that the question of interlocutory appeal under Section 1292(b) was not before the Court in *Brown Shoe.*"

Indeed, much the same is true as respects appealability under § 1292(a), for that issue was not involved in *Brown Shoe* either, and the effect of the 1948 amendment was not before the Court.

history.[18] There are no chalk marks on the slate of history to obscure its meaning.

In his brief in opposition the Solicitor General also cited *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137 (1944); *United States Alkali Export Association v. United States*, 325 U.S. 196 (1944); and *DeBeers Mines v. United States*, 325 U.S. 212 (1945). None is in point. None involved an appeal to a Court of Appeals. *Allen Calculators* was an attempt to appeal to this Court an order it held not to be final; the sole question was whether the order was final. The *Alkali* and *DeBeers* cases were attempts to have this Court review interlocutory orders by common law certiorari to the district court.

The order of the court below in this case rested on the bare citation of its decision in *United States v. FMC Corp.*, 321 F.2d 534. That case rested on the citation of *California Canneries, Brown Shoe, Allen Calculators*, and the *Alkali* and *DeBeers* cases, and three lower court cases. One, *United States v. American Association of Composers, Authors & Pulishers*, 317 F.2d 90 (2 Cir. 1963), was promptly reversed in *Shenandoah Broadcasting Co. v. Ascap*, 375 U.S. 39 (1963). Another, *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614, was a 1939 Third Circuit decision, and the Third Circuit's later decision in *Ingersoll-Rand* holds a 1292(a) order appealable to a Court of Appeals. The third, *National Association of Real Estate Boards v. United States*, 176 F.2d 631 (D.C. Cir. 1949), involved an interlocutory order of a kind not within § 1292(a) or its precursors and antedates § 1292(b).

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18. *Ex parte Collett*, 337 U.S. 55, 61 (1949): "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

Similarly, the District of Columbia Circuit's ruling in *Farbenfabriken Bayer A.G. v. United States,* 1968 Trade Cas. ¶ 72,570, rested on the mere citation of *Brown Shoe,* the *California Canneries* case, and *National Association of Real Estate Boards v. United States.*

The Relief Offered to This Court by 28 U.S.C. § 1292(b) Is Desirable and Its Use Should Be Encouraged.

To permit Courts of Appeal jurisdiction in government antitrust cases over appeals from interlocutory orders of the important and controlling kind to which 28 U.S.C. 1292(b) applies would be an enormous service to this Court in lightening its burden and in enlisting the screening agency of intermediate appellate courts. Congress has given the courts a useful tool in § 1292(b). In response to the same submission in our petition for certiorari, the Solicitor General did not controvert that statement, rather he appeared to concede it, but he argued that these facts "would not justify ignoring the limitation in the Expediting Act." That statement reversed the correct question, which is whether the Expediting Act, enacted in 1903, should be interpreted to read into the Interlocutory Appeals Act enacted 55 years later, a limitation which is not there but which is sought to be derived from the entirely different history of Section 1292(a).

The brief in opposition added that it "would be anomalous for a court which is without jurisdiction to entertain an appeal from the final judgment to rule on a 'controlling question of law'—the standard in the Interlocutory Appeals Act—which could control the outcome of the case." In response to the identical argument the Seventh Circuit in the *Fisons* case answered thus:

> "Finally, we reject the Government's argument that it would be anomalous for a court of appeals to pass on controlling quesions of law in cases which are directly reviewable in the Supreme Court after the entry of final judgment. Whenever we consider a controlling question in any litigation, our views are subject to final revision by the Supreme Court." [p. 91,346]

Far from being anomalous interlocutory review by Courts of Appeals would be helpful. With its certiorari jurisdiction this Court would still have the last word. If the decision of the Court of Appeals appeared correct, this Court would be spared labor. If the decision appeared incorrect, this Court could review but with the valued benefit of the analysis of an appellate court. It would be spared details best suited to handling by other courts. For sound reasons such as these the Seventh Circuit concluded:

> "In balance, we are persuaded that the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation as well as in other similarly complex matters." [p. 91,346]

The valuable aid of the Interlocutory Appeals Act in government antitrust cases should not be rejected upon an ambiguous history of another statute. The language of 1292(b) supports jurisdiction, and nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it. Indeed, we respectfully suggest that the use of 1292(b) in government antitrust cases might well be affirmatively encouraged. Were trial courts to cast decisions in the form of interlocutory orders, the detail of such cases—so vital to correct decision but so unsuited to this Court's procedures and so burdensome to it—could be screened by Courts of Appeal, leaving to this Court the important matters that only it can definitively handle.

CONCLUSION

It is respectfully submitted that the order of the Court of Appeals denying the petition for permission to appeal under 28 U.S.C. § 1292(b) for lack of jurisdiction should be reversed and that the case should be remanded to that court with direction to act upon the merits of the petition for leave to appeal. Where

a court fails to exercise a discretion imposed on it by law, as with respect to allowing an appeal, in the erroneous belief that it lacks jurisdiction to do so, this Court on certiorari can direct it to do so. *In re 620 Church St. Corp.*, 299 U.S. 24, 26 (1936); *House v. Mayo*, 324 U.S. 42, 44 (1945), the direction being that it render a decision not in "any particular way" but only that it be made one way or the other. *Work v. Rives*, 267 U.S. 175, 184 (1925); *Brown v. Fletcher*, 237 U.S. 583 (1915).

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Respectfully submitted

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